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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE, JUDGE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
VS.)	No. CR 16-00462 CRB 1
SUSHOVAN TAREQUE HUSSAIN,)	
)	
Defendant.)	
)	San Francisco, California
		Tuesday, February 6, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:	ALEX G. TSE Acting United States Attorney 450 Golden Gate Avenue, 11th Floor San Francisco, California 94102
BY:	ADAM REEVES ROBERT LEACH WILLIAM FRENTZEN ASSISTANT UNITED STATES ATTORNEYS
For Defendant:	KEKER, VAN NEST & PETERS LLP 633 Battery Street San Francisco, California 94111-1809
BY:	JOHN W. KEKER, ESQ. JAN NIELSEN LITTLE, ESQ. BROOK DOOLEY, ESQ. CODY GRAY, ESQ. IAN KANIG, ESQ. NIC MARAIS, ESQ.
Also Present:	SUSAN D. RESLEY, ESQ. Morgan Lewis

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

1 Tuesday - February 6, 2018

10:00 a.m.

2 P R O C E E D I N G S

3 (The following proceedings were held outside of the
4 presence of the Jury)

5 **THE CLERK:** Calling Criminal Action CR-16-0462, USA versus
6 Sushovan Tareque Hussain. Counsel, please state your
7 appearances for the record.

8 **MR. LEACH:** Good morning, Your Honor. Robert Leach, Adam
9 Reeves and Will Frentzen for the United States.

10 **MR. KEKER:** Good morning, Your Honor. John Keker, Jan
11 Little and Brook Dooley for Mr. Hussain, who is present in
12 court.

13 And if I could introduce you to four other lawyers that are
14 representing Mr. Hussain who have been working on these motions
15 and will be arguing the motions, or at least some of them.

16 Kate Lazarus, of our firm. Nic Marais -- all of our firm --
17 Ian Kanig, and Cody Gray, who I understand was last year just
18 down the hall working for Judge Seeborg.

19 **THE COURT:** Exactly. Managed to recover from that
20 experience.

21 **MR. KEKER:** We'll see, Your Honor.

22 **THE COURT:** Okay. Good morning. Thank you so much for
23 being here this morning. I wanted to take care of a lot of
24 things this morning. But the first one is the Alternate No. 6,
25 Ms. Scheffix, or Scheffy.

1 And I asked the court reporter to give me the excerpt of her
2 voir dire, because, because, indeed, she had not identified this
3 vacation in her -- in her questionnaire. But she did bring it
4 to the Court's attention in the voir dire. In the verbal
5 voir dire.

6 And my -- my present inclination is to let her go. I did
7 find out some other things about it, which was that she did not
8 know about this when she filled out the questionnaire, and
9 apparently in her conversations she had with Ms. Scott, she said
10 that when she got home that day or the next day, her husband
11 said: I have arranged for a surprise trip to Canada, we have an
12 Airbnb, da, da, da, da, da, you know.

13 Look. Lawyers should take vacations when they can. I mean,
14 you know. It's a difficult life being a trial lawyer. So I'm
15 inclined to let her go.

16 I'm at a particularly awkward position in that the judge
17 announced to everybody that he is going on vacation. And their
18 schedule will have to accommodate his schedule. So, you know,
19 unless there's a strong view that I should keep her, I'll let
20 her go.

21 **MR. FRENTZEN:** No objection.

22 **MR. KEKER:** No objection, Your Honor.

23 **THE COURT:** All right, thank you very much. And I'll ask
24 Ms. Scott to simply give a call to her and tell her that she
25 need not -- she's excused from service.

1 **THE CLERK:** Okay.

2 **THE COURT:** Well, we have a lot of motions. And I don't
3 know of any other way simply to go through them all.

4 **MR. KEKER:** Your Honor, did you get -- we filed a list of
5 them. Do you have that?

6 **THE COURT:** I do have the list.

7 **MR. KEKER:** Yeah, we filed a pleading that we thought would
8 help just walk through it. We served it on the --

9 **THE COURT:** I don't know that I have it. I do? Is that --

10 (Document handed up to the Court)

11 **THE COURT:** The clerk here has a list. Oh, okay.

12 **MR. KEKER:** You're welcome.

13 **THE COURT:** I don't care. We can go in any order anybody
14 wants to go in.

15 **MR. LEACH:** We have no view, Your Honor.

16 **THE COURT:** Okay. So let's go through the order that is
17 suggested by the defendants. And the -- so the first motion --
18 they approached the government's motions in limine first. And
19 we'll take that.

20 The first one is to preclude evidence of agency charging
21 decisions.

22 **MR. FRENTZEN:** I think that could be a short discussion,
23 Your Honor.

24 They agreed with our motion. They asked for additional
25 things. We said: We're not prepared to commit to that at this

1 point; file a motion if you want it.

2 And that's where we are. So we think the motion should be
3 granted.

4 **MR. MARAIS:** Your Honor, we don't oppose the motion. I
5 would just note though that the government's wording in its
6 original motion was a little loose, and there is no proposed
7 order.

8 We had suggested some clarification in our opposition in the
9 conclusion on Page 4. The government had some clarification in
10 their reply in the middle of Page 2. Either of those is fine
11 but the distinction that we were drawing is that we understood
12 the government's motion to be an effort to exclude evidence
13 about charging decisions related to Mr. Hussain, only.

14 And with that, we're fine.

15 **MR. FRENTZEN:** At this point that's where we are at, that's
16 what we asked for.

17 **THE COURT:** I'm granting the motion.

18 **MR. FRENTZEN:** Thank you, Your Honor.

19 **THE COURT:** Motion No. 2, motion to admit Autonomy Systems
20 Limited restatement.

21 **MR. DOOLEY:** Good morning, Your Honor, Brook Dooley for
22 Mr. Hussain.

23 **THE COURT:** Yeah.

24 **MR. LEACH:** So Your Honor this is a motion to admit a
25 restatement prepared by Chris Yelland and his team, the

1 successor CFO at Autonomy and one of its subsidiaries. This
2 evidence is relevant because it shows the falsity and the
3 magnitude of some of the statements in the original accounting.
4 It's admissible as a business record under the leading Ninth
5 Circuit case in this area, *SEC versus Jasper*.

6 And for those reasons, the motion should be granted.

7 **MR. DOOLEY:** Three points. Number one, I think the Court at
8 the very least ought to defer ruling on this until the Court has
9 heard further evidence that puts the relevance of the
10 restatement into context and evidence regarding the preparation
11 of the restatement.

12 But two substantive points, Your Honor. The first is the
13 403 point which is the defendant, Mr. Hussain is charged with
14 falsifying the accounts of the Autonomy Corporation, a
15 publicly-traded company operating under the international
16 financial reporting standards. The restatement relates to a
17 different company, Autonomy Systems Ltd. that is not publicly
18 traded, that doesn't have shareholders, and that operates under
19 a different set of accounting rules.

20 Furthermore, the allegations in the indictment allege that
21 HP relied on the financial statements of Autonomy Corporation,
22 not Autonomy Systems Ltd.

23 There is no reference anywhere in the indictment to Autonomy
24 Systems Ltd. which is the company that restated its accounts.
25 To the extent that there is any relevance here, Your Honor, it

1 is attenuated and outweighed by the substantial confusion and
2 potential prejudice of introducing these accounts.

3 **THE COURT:** Well, okay. The only thing that deserves some
4 further discussion on that is, is whether the restatement is
5 really -- it really isn't apples and oranges. Is the
6 restatement something other than what were the basic records at
7 issue here? They say they are.

8 **MR. LEACH:** And we say they are not, Your Honor. And the
9 evidence will show that they're not.

10 **THE COURT:** Okay, that's fine. So the answer is it comes
11 in. Number one, I'm not deferring the ruling. I'm always sort
12 of deferring rulings in the sense that you can, you know,
13 through examination and so forth, if in fact it shows that it's
14 totally improper then I'll take a corrective action.

15 Maybe there's another way of saying it. It's: A lot of
16 these things come in subject to a motion to strike. If it turns
17 out that they haven't laid the foundation or it turns out that
18 it is really an apples-and-oranges case and it's clear that it
19 is, then it's out.

20 But I can't sort of hide -- I can't tie up the hands of one
21 side or the other based upon a theory that ultimately it will be
22 shown to be different. That is inadmissible. Or of such
23 marginal relevance that it ought not to be limited -- it ought
24 not to be included.

25 I understand your argument. I think basically, unless your

1 last argument is the argument, the rest of your arguments that I
2 see here where it basically go to weight, and how much weight do
3 you attribute to it.

4 But based upon their representation -- and I'm accepting
5 their recommendation, for the purposes of the commencement of
6 the trial, the opening statement and to see where we go in the
7 trial. The trials are always changing things. And it may be
8 that through examination, you show that this is totally some
9 other animal; I'll reconsider it.

10 So I'm going to grant the government's motion, subject to a
11 motion to strike.

12 **MR. LEACH:** Thank you, Your Honor.

13 **MR. DOOLEY:** Your Honor, may I be heard before we finalize
14 this? I think there is substantial risk of prejudice, if the
15 government is allowed to refer to this in opening statements
16 before any testimony has come in, regarding preparation of --

17 **THE COURT:** I understand that argument. And it is with that
18 in mind that I am still allowing it to come in. Okay?

19 **MR. DOOLEY:** Thank Your Honor.

20 **THE COURT:** All right. Thank you.

21 As to the summary charts --

22 **MR. DOOLEY:** This is me as well.

23 **THE COURT:** As to the summary charts, I want to defer on
24 that. I am -- I am not going to let them in, I'm not going to
25 not let them in. I want to see whether the foundation has been

1 laid. I want to see that the underlying information comes in in
2 some form or another.

3 **MR. DOOLEY:** (Nods head)

4 **THE COURT:** And then I'll make a decision as to whether or
5 not they come in. I mean, you know, that old instruction, the
6 summaries are just as good as the underlying evidence, you have
7 to have the underlying evidence in.

8 Summaries are -- and my guess is summaries will be very
9 powerful in this case. They will carry a lot of -- let's put it
10 this way -- the burden of demonstrating whatever needs to be
11 demonstrated, at least from the government's point of view.
12 Obviously, you will have your own.

13 But, so, it is with some caution that I want to proceed with
14 summaries. And I don't take the same approach to the summaries
15 that I do with respect to the previous matter. Okay?

16 **MR. REEVES:** Understood. Thank you, Your Honor.

17 **THE COURT:** Deferred.

18 **MR. DOOLEY:** Thank you, Your Honor.

19 **THE COURT:** Okay, that then takes us to preclude evidence of
20 HP's tax treatment.

21 **MR. LEACH:** Your Honor, throughout this litigation, the
22 United States has heard arguments that, you know, Autonomy
23 acquisition was in part, at best, a scheme by HP to avoid taxes
24 here in the United States. And at worst, some form of scheme to
25 commit tax fraud here in the United States. It ties in to a lot

1 of information out in the press right now and in current
2 legislation about whether lots of public companies are hoarding
3 cash in the United States. It really has -- outside the --
4 outside the United States. It really has absolutely no
5 relevance to what statements the defendant made to the market
6 and to HP to induce it to go through with this acquisition.

7 It will create a massive mini-trial on the tax implications
8 in Europe, in the United States, that really have no bearing on
9 the ultimate issue in this case. And for those reasons, we
10 think it is appropriately excluded under 403.

11 **MR. GRAY:** Thank you, Your Honor. Just a few points in
12 response. Cody Gray for the defendant, Sushovan Hussain.

13 Your Honor, evidence of HP's tax treatment of the Autonomy
14 acquisition is relevant to the materiality determination under
15 the wire fraud statute. It's proper evidence under Rule 403.
16 And at the very least, this Court should defer ruling on the
17 motion until it's had the opportunity to hear from the relevant
18 HP witnesses on the stand.

19 Now, Your Honor, depending on the government's presentation
20 of evidence --

21 **THE COURT:** Okay, I'll grant you that, I'll defer it.

22 **MR. GRAY:** Okay.

23 **MR. LEACH:** Thank you, Your Honor.

24 **MR. KEKER:** First motion, and I call it a win, Your Honor.

25 **THE COURT:** That's right. Don't think this continues, by

1 the way. You know better than that. Okay.

2 Okay, next is the co-conspirators' out-of-court statements.

3 How would I -- how am I going to rule on that one?

4 **MR. FRENTZEN:** I'm sorry, Your Honor, I think it's really
5 the Defendant's statements, for the most part.

6 **THE COURT:** Defendant's --

7 **MR. FRENTZEN:** Own statements, is the emphasis.

8 **THE COURT:** Statements by Hussain and, quote,
9 "co-conspirators." I don't know. I'm reading off the
10 defendant's --

11 **MR. FRENTZEN:** Oh, I got you. This is our motion in limine,
12 Your Honor.

13 **THE COURT:** Right.

14 **MR. FRENTZEN:** It's simply based on 801, that on the
15 definition of hearsay, statements by the defendant or by a
16 co-conspirator are not within the definition of hearsay when
17 offered by a party opponent, us, but are defined as hearsay when
18 offered by the defendant, himself. That was the simple point of
19 our motion.

20 We're trying to avoid getting offers of statements by the
21 defendant, an effort to admit it as non-hearsay. They make the
22 point in their opposition that there may be other exceptions to
23 the hearsay rules. We think that's true.

24 And if, in fact, there are statements offered by the
25 defendant that are his own statements that have a sponsoring

1 witness, and they're able to describe for the Court an exception
2 to the hearsay rule, then that is how trials work.

3 So I think it is a fairly simple motion. We're just looking
4 to make sure that we, you know, have every opportunity to front
5 that issue and try to avoid the admission of inadmissible
6 hearsay statements.

7 **MR. KANIG:** Your Honor, the government asked in its motion
8 for a blanket prohibition against admitting Mr. Hussain's
9 out-of-court statements and those of his alleged
10 co-conspirators, and we believe that's premature. As the
11 government says just now, there may be hearsay exceptions that
12 apply to any of those statements.

13 **THE COURT:** Okay, I'll defer on that. I mean, I do think,
14 though, that the government's statement of the law is correct.
15 Okay? That's number one. So, in other words, just because a
16 defendant says X, it doesn't come in. It's not an exception to
17 the hearsay rule.

18 **MR. KANIG:** We're not arguing that the party opponent
19 exception --

20 **THE COURT:** There may be other rules, there may be other
21 things, other responses. I don't know. Can't decide it, right,
22 right, can't decide it.

23 Now, I do want to -- I do want to just return to the
24 previous statement. The previous motion. Which is: While I am
25 deferring -- this is on -- HP's tax treatment, your win?

1 **MR. KANIG:** I'm sorry, Ian Kanig for Mr. Hussain. Thank
2 you.

3 **MR. GRAY:** Yes, Your Honor.

4 **THE COURT:** While I'm deferring on that, it would be my
5 expectation that that would not be referred to in the opening
6 statements by the defense.

7 **MR. GRAY:** That's our expectation.

8 **THE COURT:** Good.

9 **MR. LEACH:** Thank you for that clarification, Your Honor.
10 We were going to come back to you about that.

11 **THE COURT:** Yeah.

12 **MR. LEACH:** We appreciate that.

13 **THE COURT:** Yeah, okay. All right. Thank you.

14 **MR. KEKER:** Your Honor, could I ask for a clarification --

15 **THE COURT:** Yes.

16 **MR. KEKER:** -- to the opening statement. If they say that
17 Hewlett-Packard acquired Autonomy, that's not true. And so,
18 what can I say in the opening --

19 **THE COURT:** You say that's not true.

20 **MR. KEKER:** Pardon?

21 **THE COURT:** You would say that's not true.

22 **MR. KEKER:** Well, but can I say -- I mean, it's not true.
23 BidCo, who is suing Mr. Hussain and Mr. Lynch in England, BidCo,
24 Cayman Islands, BidCo acquired Autonomy. So if they're going to
25 say that Hewlett-Packard -- and they've said Hewlett-Packard's a

1 victim, poor Hewlett-Packard, this, this, this, Hewlett-Packard
2 shareholders, if they are going to say that, I should be able to
3 say the contrary, because it is simply not true.

4 **THE COURT:** Well, first of all, you can certainly -- I don't
5 know that you are asking me, but obviously, if the government
6 says something that you have some disagreement with, of course
7 you can say that. Now, you know, I can't -- I'm not going to
8 have a dress rehearsal of opening statements here. And, I'm
9 going to tell the jury, I always tell the jury, opening
10 statements are not evidence.

11 So you have to make a calculated judgment as to -- and you
12 do it all the time -- as to what you put in and what you don't
13 put in. Because it may be that you're -- at the end, you're a
14 little bit hung to dry because the evidence hasn't come in.

15 And I think the law is -- again, I may be saying more than I
16 have to say -- but I think the law is that if something is
17 represented to occur in the opening statement and then there is
18 a failure of showing it in terms of evidence, I think the other
19 side can comment on it. I think so. I don't know, I'm not
20 there yet.

21 But I want to just caution both sides that you have to --
22 you know, you give your opening statement at risk. At risk.
23 And we're all --

24 **MR. KEKER:** (Inaudible)

25 **THE COURT:** -- presumptively grown-ups here, so we are

1 willing to take whatever the risks are involved. But when I go
2 back to the tax treatment and so forth, it really -- I have to
3 say that I have to be convinced that it is probative and
4 relevant of one of the issues. The government takes a -- their
5 strong position that it is not. So it may be, I'm going to
6 defer on it. But, but I just caution the parties about that.

7 And I also would say, as to that particular issue, it
8 shouldn't be addressed in the opening statement. Okay?

9 **MR. KEKER:** Thank you, Your Honor.

10 **MR. LEACH:** Thank you, Your Honor.

11 **THE COURT:** Okay. Finally, motion, blaming the victim.

12 Mr. Reeves.

13 **MR. REEVES:** Thank you, Your Honor.

14 In this motion, the government is responding to a variety of
15 contentions that the defense has made over the course of this
16 case that have the effect of blaming HP.

17 In our judgment, evidence of a victim's alleged negligence
18 or intentional disregard is irrelevant and unduly prejudicial
19 under Federal Rules of Evidence 401, 402, and 403, and is
20 properly excluded under the ruling by the Ninth Circuit in
21 *United States v. Lindsey*.

22 **THE COURT:** But isn't it a question of -- as a general
23 proposition, of course you're absolutely right. But the
24 question is: How does it come in? What are they intending to
25 show?

1 I think what they're going to say to me, though I'm
2 anticipating it, is: It's going to show there was not reliance,
3 okay, whatever that means in the context of this, and then it
4 wasn't -- maybe they're going to say it wasn't material. So
5 forth. I don't know quite what it's going to show.

6 I think they can't say or they shouldn't say: Well, look,
7 Hewlett-Packard was negligent. They were careless. They could
8 have done this, they could have done that.

9 I don't know that that's relevant. That's your point.

10 **MR. REEVES:** That is my point.

11 **THE COURT:** So I don't know -- when you say "blaming the
12 victim," I don't know what you're saying. What are you saying?

13 **MR. MARAIS:** Well, Your Honor, I'm not suggesting anyone's
14 blaming the victim. This is the government's motion. I will
15 note we spent months last year asking the government to identify
16 its victim. And now they've filed a four-page motion that says
17 "HP" 18 times, so we've learned something.

18 I think that the case that the government relies on here,
19 *Lindsey*, is really beside the point. As we have set out in the
20 opposition brief, what we need to introduce as evidence is
21 questions that HP asked, questions that they chose not to ask
22 during due diligence. The negligence in *Lindsey* is post-fact,
23 it is negligence about information that was provided.

24 One of the examples that the government cited in its motion
25 is the idea that HP may or may not have been interested in

1 Autonomy's hardware sales. If somebody during due diligence
2 expressed that HP was not interested in Autonomy's hardware
3 sales, well, that is plainly relevant to disproving an
4 allegation, an allegation that's in the indictment, that
5 Mr. Hussain and others concealed hardware sales.

6 So, Your Honor is obviously right that this goes to reliance
7 and it goes to materiality. But this is a much more complicated
8 case than *Lindsey* and it also goes to explaining the
9 back-and-forth during due diligence. I think it's impossible to
10 assess whether an answer that was given, information that was
11 provided, is misleading or a misstatement unless the jury
12 understands what the questions were, what the context was, what
13 Autonomy understood HP to be interested in, and what information
14 it understood HP to be asking for.

15 So I think Your Honor is right that this needs to be
16 deferred, and assessed as the evidence comes in.

17 **MR. REEVES:** I agree with a lot of that.

18 **THE COURT:** Good. Okay, then that will be the ruling.

19 **MR. REEVES:** Okay. I -- if I could just --

20 **THE COURT:** I'm just deferring because I think -- I need a
21 context. I think I need to hear more about it before I can --
22 before I can --

23 **MR. REEVES:** Just two points.

24 **THE COURT:** Yes, go ahead.

25 **MR. REEVES:** The Court is correct and I accept much of

1 counsel's argument. We invite a full discussion of all the
2 evidence around the due diligence and the decision-making at HP
3 to acquire Autonomy. That's fine.

4 It is arguments that go to sloppiness, negligence, lack of
5 care that are improper. That's Point No. 1.

6 Drawing that line in this case, we accept that's something
7 that should be done over the course of trial.

8 **THE COURT:** But it could be, it could be. I just would say
9 this. Whatever those terms are -- sloppiness, inattention, and
10 so forth -- could be evidence of whether or not they considered
11 it important. You see.

12 In other words, you could say: Well, they could have
13 checked this out or they could have checked that out. And they
14 didn't. Given fact. They didn't check out A, B and C. Okay?

15 Now, why didn't they do so? Well, one thing is they just --
16 careless. Two is they didn't care. It meant nothing to them.
17 So, it's not a question of carelessness; it's a question of
18 indifference. And indifference may turn to materiality, and
19 maybe other things as well.

20 So I think I need a context in order to rule on it. Okay?

21 **MR. REEVES:** That's fine. Thank you, Your Honor.

22 **MR. MARAIS:** Thank Your Honor.

23 **THE COURT:** Thank you. Turning now to the defense motions.

24 **MS. LAZARUS:** Kate Lazarus for Mr. Hussain.

25 **THE COURT:** So this is the motion to exclude 404(b) evidence

1 related to Mr. Khan. Is that right?

2 **MS. LAZARUS:** That's correct, Your Honor. And our first and
3 second 404(b) motions really are on similar grounds. The second
4 motion relates to termination of certain Autonomy employees.
5 The motion as to Mr. Khan, Mr. Khan was a securities analyst who
6 covered Autonomy and whom, according to the government, had some
7 disagreements with Autonomy management back in 2008. In both of
8 these cases --

9 **THE COURT:** Let me, give me a moment, I just want to read my
10 notes on it.

11 **MS. LAZARUS:** Okay.

12 **THE COURT:** Then we can --

13 (The Court examines document)

14 **THE COURT:** Okay, Ms. Lazarus.

15 **MS. LAZARUS:** The issue with Mr. Khan occurred in 2008 prior
16 to the beginning of the alleged scheme to defraud, and the
17 interactions that are described in Mr. Khan's statements to the
18 governemtn do not involve Mr. Hussain. Allegedly the CEO of
19 Autonomy made some kind of threat to him in a meeting.
20 Allegedly the COO of Autonomy informed Mr. Khan that he was
21 under investigation by UK regulators.

22 None of these decisions or actions are attributed to Mr.
23 Hussain, who is on trial here. The government has not charged
24 any -- Mr. Hussain's other colleagues. So we think this is
25 evidence that's improperly seeking to invite the jury to blame

1 Mr. Hussain for his colleagues' actions. We think that's
2 prejudicial and inadmissible under 404(b) because 404(b)
3 evidence has to involve the defendant, himself.

4 **MR. REEVES:** Well, Your Honor, I think it's a little bit
5 more complicated than that. We do anticipate that Mr. Khan will
6 testify. I accept the fact that he was excluded in 2008 for
7 criticisms he made in the course of his analysis.

8 But in 2009, he was excluded from a series of the earnings
9 calls that Mr. Hussain and others from Autonomy participated in,
10 and I think for him to explain his return to his analysis, it's
11 going to be necessary to explain why he was excluded.

12 It gets further complicated in the sense that there is
13 another piece of evidence in which the defendant, himself, is
14 joking with his co-conspirators about Cazenove, which is the
15 investment bank that Mr. Khan worked at.

16 And I think this is part of a broader pattern that reflects
17 itself in still more of the evidence that the defense seeks to
18 exclude in the form of retribution and silencing of critics, as
19 exemplified by the testimony of Frank Hogenson.

20 **THE COURT:** Your argument is basically that it shows
21 Mr. Hussain's state of mind, that actually to take these actions
22 or to participate in these actions or know of these actions
23 relating to Mr. Khan is evidence that Mr. Hussain was aware of
24 the significance of these actions.

25 Is that it?

1 **MR. REEVES:** That is absolutely correct.

2 **THE COURT:** That is what I understood it to be.

3 **MR. REEVES:** You said it vastly better than I did. Thank
4 you.

5 **THE COURT:** Well, I don't know that I said it so well, but
6 anyway.

7 **MS. LAZARUS:** I don't think that any of that points to
8 evidence that Mr. Hussain, himself, was responsible --

9 **THE COURT:** I don't know.

10 **MS. LAZARUS:** -- for this conduct.

11 **THE COURT:** I mean, I don't know. The question is -- it's
12 actually significant evidence. The question is whether it will
13 be tied to Mr. Hussain. I don't know that it will. I don't
14 know. I don't know whether a jury could draw a reasonable
15 inference that it was. That's a question.

16 If they can't, then I think it is prejudicial. I think it
17 has to be stricken and the jury admonished. But if a reasonable
18 inference could be drawn from it, then I think it comes in.

19 And again, and why I hate motions in limine is because they
20 ask judges to decide things in vacuums where it's very hard to
21 make that determination.

22 I understand your concern. But again, we have to just let
23 it flesh out. And the government represents that they can --
24 that they can make these connections. Maybe they can, maybe
25 they can't. Yeah.

1 This is going to be a long trial. I think that motions to
2 exclude and so forth, to strike evidence and so forth, if I do
3 that sort of thing may have -- I mean, I think the jury will be
4 glad to forget something. Maybe that's another way of saying
5 it.

6 Anyway, it comes in, subject to a motion to strike.

7 **MS. LAZARUS:** Your Honor, could I just ask for one point of
8 clarification?

9 Is the standard going to be that Mr. Hussain knew about his
10 colleagues' actions vis-à-vis Mr. Khan, or that he was in some
11 way responsible for them?

12 **THE COURT:** And the answer to that is I'm not quite sure. I
13 have to see what it is. I have to see what the evidence is.

14 I think there has to be some reasonable inference that
15 either, one, he knew, or that the actions, themselves, that is,
16 what they were concealing, themselves, is some evidence of
17 misrepresentation.

18 You know, there are a number of steps here. They have to
19 show that -- they have to show, I think the government has to
20 show: What is the reality? If everything were out in the open,
21 totally reported, clearly defined and so forth, what are the
22 facts? And then, what did Mr. Hussain know? And, what did he
23 do? What did he know, what did he do, and what are the facts?
24 The underlying facts. Those are all parts of it.

25 And I can't sit here and tell you that, well, it wouldn't

1 come in for this purpose, which is what you are asking me to do,
2 to cabin it in a way. I don't know that I can cabin it to what
3 exactly did Mr. Hussain know. Because it may come in for other
4 purposes. And I have to sort of sit back, let the jury, let it
5 unfold. And then decide: Is it a -- you know, what are the
6 reasonable inferences that could be drawn?

7 A little bit -- I understand. I just can't do it in
8 advance. So I'm going to -- it's a defense motion. I'm going
9 to deny the motion, but subject to a motion to strike.

10 And that would also be true -- I guess we should talk about
11 the terminations of Hogenson and Tejada and Prasad. Because
12 that's another motion, right?

13 **MS. LAZARUS:** Yes, Your Honor. Again, it is a similar
14 concern here. One of the government's witnesses, Mr. Scott,
15 told the government that he, alone, was responsible for the
16 terminations of these employees. So again, we think that
17 through 404(b) the government's seeking to invite the jury to
18 punish Mr. Hussain for his colleagues' actions.

19 And I also think we have an even more significant 403
20 problem with these terminations because our understanding is
21 that these individuals were terminated because there was payroll
22 fraud going on in their department. There was an SFPD
23 investigation, there was a jail sentence, there were millions of
24 dollars that were stolen from the company.

25 And if the government's going to introduce evidence that

1 these people were terminated, we're going to be required to
2 introduce evidence about the reasons why, about this
3 investigation into payroll fraud, and into other policy
4 violations by Mr. Hogenson and his department.

5 **THE COURT:** That may be true. I don't know. Let's hear
6 what the government says.

7 **MR. REEVES:** We think this was retribution, Your Honor, as
8 to Mr. Hogenson. There was a payroll fraud. It is extraneous,
9 based on our investigation, the facts that we intend to prove
10 that Mr. Hogenson was somehow responsible for it.

11 The sequencing of what happened here is quite important.
12 Mr. Hogenson is a newly arrived CFO as a result of the
13 acquisition from -- of -- Interwoven by Autonomy. He, over the
14 course of about six to nine months, observes a series of
15 problems that are highly consistent with the allegations in the
16 government's indictment. He raises this in a whistleblower
17 format to auditors and to the audit committee, et cetera.

18 Mr. Hussain and others directly engage with him about some
19 of those complaints, and within days thereafter, there is this
20 alleged allegation that Mr. Hogenson is responsible for this
21 payroll fraud. Which ultimately Mr. Scott attributes as a form
22 of retribution, the firing of Mr. Hogenson was a form of
23 retribution for the whistleblowing.

24 So, again, it is complicated. There's a lot of nuance,
25 there are moving pieces. But I don't see this as seguing into

1 payroll fraud.

2 **THE COURT:** Well, isn't the answer to all of this that they
3 come in and they say these people were terminated, you know,
4 because they were whistleblowers or that they were aware of what
5 was going on or something in connection with the underlying
6 fraud here.

7 And you say no, no. They were terminated for other reasons.

8 And you know what? You might be right. That's what the
9 jury does. You know, I mean, unless you were to argue, unless
10 there was just no evidence that somehow a jury could draw a
11 reasonable inference that they were fired because of X, and it's
12 clear that they were fired because of Y, then if that's the
13 case, then of course I would not -- I would have to address
14 that.

15 But the government says no, there will be evidence, and it
16 will be sequential, it depends on the context, dates are
17 important, timing is important and so forth, we'll demonstrate
18 exactly what happened along the lines.

19 Now, they may be right, they may be wrong. I don't know.
20 We'll see. Denied. Thank you.

21 Okay, moving ahead. The Autonomy correspondence with the
22 FRRP.

23 And by the way, I have no problem, since I'm not so inclined
24 to buy your argument, I have no problem giving a limiting
25 instruction, which I think is important here, that -- to limit

1 it that it may not be -- you know, it's not evidence of the --
2 what is it, fraud --

3 **MR. LEACH:** Of the crime, it's evidence of intent, motive,
4 et cetera.

5 **THE COURT:** That's right. So if I permit it, it would be
6 with a limiting instruction.

7 **MR. LEACH:** Understood.

8 **MS. LAZARUS:** Thank Your Honor.

9 **THE COURT:** Okay.

10 **MS. LAZARUS:** This next motion refers to some letters that
11 were exchanged between Autonomy and regulators in the United
12 Kingdom. Those letters ultimately did not lead to a complaint
13 against Autonomy or our client so we think it is a distraction
14 and prejudicial and will invite speculation about an
15 investigation that occurred overseas.

16 **MR. LEACH:** These are statements by the defendants to his
17 accounting regulator in the UK, relating in part to some of
18 Mr. Hogenson's complaints. The government intends to prove that
19 some of those statements are false and that the defendant knew
20 they were false. They were made during the scheme. The
21 indictment specifically alleges the defendant misled regulators
22 in the UK. These are the defendant's own statements. It is
23 hard to imagine something more probative, Your Honor.

24 **THE COURT:** I'm going to permit it.

25 Okay.

1 **MR. LEACH:** Thank you.

2 **THE COURT:** Let's move to the motion to exclude evidence of
3 the FRC investigation. My understanding is that the
4 government's not going to introduce any such evidence. Is that
5 correct?

6 **MR. LEACH:** Your Honor, the government does not intend to
7 introduce evidence of the investigation that the FRC started
8 after the HP announcement of the write-down. I can imagine some
9 circumstances where witnesses are testifying who are involved in
10 that investigation where the fact of the investigation and the
11 fact that they are witnesses in that investigation could be
12 relevant, but other than that -- to bias and other reasons.
13 Other than that, we have no interest in getting into it.

14 **THE COURT:** Well, let me pin you down a bit. Is it your
15 intention with your witnesses to bring out the fact of this
16 investigation?

17 **MR. LEACH:** No.

18 **THE COURT:** Or are you saying that it may be that the
19 defense in cross-examination would -- would ask questions that
20 would be relating to bias and prejudice and so forth?

21 **MR. LEACH:** We have no intention of getting into --

22 **THE COURT:** Okay, so it really is in your court. At least
23 that aspect of it. You know, I don't think that opens the door
24 to everything else and so forth, you know. It doesn't open the
25 door. Unless you get into the substance. If you start getting

1 into the substance then obviously you open the door. But you
2 are not going to do that.

3 **MR. LEACH:** I can give an example, Your Honor. One --

4 **THE COURT:** I don't need an example. Thank you.

5 **MR. LEACH:** Thank you.

6 **THE COURT:** Okay. Moving ahead.

7 Motion to exclude testimony concerning Chamberlain and
8 Kanter laptops. The government does not oppose?

9 **MR. REEVES:** Correct, Your Honor.

10 **THE COURT:** Granted. Okay. Next is a motion to exclude
11 evidence of prejudicial "antics." The government doesn't
12 oppose?

13 **MR. REEVES:** Oh, we oppose.

14 **THE COURT:** What are the antics? What are the antics? A
15 parody video.

16 **MR. REEVES:** I would like to hand up, if I could
17 (Indicating) --

18 (Document handed up to the Courtroom Deputy)

19 **THE COURT:** I'm not -- what?

20 **MR. REEVES:** Would you like --

21 **THE COURT:** This is some parody video that the defendant
22 created?

23 **MR. REEVES:** It's a sales video that they play at the sales
24 conference in which the defendant and Dr. Lynch, Mr. Kanter and
25 Mr. Monell (Phonetic) pretend to be American Mafiosos. And it

1 is entirely --

2 **THE COURT:** And it could really offend people. I mean, I
3 haven't seen it, but couldn't it really offend people?

4 **MR. REEVES:** I acknowledge that this is a very interesting
5 piece of evidence.

6 **THE COURT:** Well, call it "interesting."

7 **MR. REEVES:** I suggest the following. I would like the
8 Court to look at it. It is only about four minutes long. So I
9 don't think it is going to be easy to rule on this evidence
10 without seeing it. And I also think this is a very good thing
11 for us to defer to see how they --

12 **THE COURT:** Okay, I'll look at it, I'll defer it. My
13 inclination is not to let it in. You know -- my inclination is
14 not to let it in, but again, I have to look at it so I'll --

15 **MR. REEVES:** Could I offer a couple comments on that?

16 **THE COURT:** Yes.

17 **MR. REEVES:** There are aspects of the humor that are
18 directly relevant to the trial evidence, like -- my witness
19 stand is over here (Indicating) -- like Cazenove, like Daud
20 Kahn. There's joking about intimidating a person from Cazenove.
21 Okay? So that's the defendant there, joking about this. We
22 have to wait and see how this evidence really develops.

23 **THE COURT:** I'll look at it.

24 **MR. REEVES:** Okay, good.

25 **THE COURT:** I'll look at it.

1 **MS. LAZARUS:** We would just note our disagreement of your
2 characterization of the evidence. It's a comedy video. It's
3 very light on specifics about anything, much less anything
4 relevant to this case. It's purely entertainment.

5 **THE COURT:** I think this is a classic document. Whether the
6 probative effect outweighs its prejudicial nature -- because I'm
7 always concerned about jokes. Obviously, I'm not concerned
8 about my jokes, though I should be. But I'm concerned about how
9 it's all taken by people who don't think anything is funny. You
10 know. And I'm sure there is -- most of this case is not funny.
11 Especially to the parties. And I appreciate that. So, and
12 we're giving the jury a serious matter. So, I'm just -- I'm
13 concerned about introducing this sort of thing. I'll look at
14 it, though, because it does -- if it shows an attitude -- as an
15 example, a statement is made that shows an attitude towards an
16 -- an issue here, it could be relevant.

17 **MR. REEVES:** I think that's exactly right.

18 **THE COURT:** There may be ways to -- if it -- number one,
19 we'll have an argument about that before it comes in. Number
20 two, there may be ways to sanitize it, if it even does come in.
21 Okay?

22 (Off-the-Record discussion between counsel)

23 **MR. REEVES:** Can I just confer for one second?

24 **THE COURT:** Yes, conference.

25 (Off-the-Record discussion between counsel)

1 **MR. REEVES:** Okay. First, thank you, Your Honor. The
2 government is sensitive to this evidence. You know, I
3 understand the Court's comments.

4 And there's one other piece of substance that I would like
5 to alert the Court to in the video. And that is Mr. Hussain
6 functioned as the *de facto* head of sales at Autonomy. That is
7 what the government intends to prove.

8 And I think there will be abundant evidence showing that.
9 That he may have had the title of "CFO," but he was really
10 running, on a day-to-day basis, the sales operation for this
11 company. And that is clearly collected and fully corroborated
12 in the video. That is the source of the humor in the video, I
13 would say.

14 So again, depending on how the evidence unfolds, there could
15 be lots of ways in which this becomes relevant, responsive. And
16 I think it is appropriate, as the Court has said, for the Court
17 to review it in advance, and see how the evidence develops at
18 trial.

19 **MS. LAZARUS:** We just submit that we don't believe the video
20 proves any such thing. But in any event, there are any number
21 of Autonomy witnesses who are going to testify. So if the
22 government needs evidence of the role that Mr. Hussain played, I
23 don't think they need to get it through a highly prejudicial
24 video in which the defendant is dressed up as a member of the
25 Mafia.

1 **THE COURT:** Okay. Got it.

2 **MR. REEVES:** Thank you.

3 **MS. LAZARUS:** Thank you.

4 **THE COURT:** So now we are -- motion to exclude aspects of
5 Steven Brice's testimony.

6 **MR. GRAY:** Yes, Your Honor. Your Honor, there are two
7 issues with respect to the government's accounting expert,
8 Mr. Steven Brice. First, he asserts that Autonomy's accounting
9 was incorrect for 67 transactions but he only disclosed analysis
10 for 22 of them. And he provides no explanation, much less
11 conducts any analysis to demonstrate that the 22 transactions he
12 examined are somehow representative of the larger group of 67.

13 Second, Your Honor, Mr. Brice --

14 **THE COURT:** So why isn't that -- why isn't that something
15 that is subject to appropriate cross-examination? I guarantee
16 you, the government believes that the witness will say why those
17 22 are representative, right? Or whatever that number is.

18 **MR. LEACH:** Yes, Your Honor.

19 **THE COURT:** Okay. So they'll say that. Now, my question
20 is: Yeah, and you disagree?

21 **MR. GRAY:** Yes, yes, Your Honor, we disagree.

22 **THE COURT:** All right. Well, that is called
23 cross-examination. Isn't it?

24 **MR. GRAY:** Well, Your Honor, under Rule 702 they have to
25 demonstrate that Mr. Brice's opinion is based on the product of

1 reliable principles and methods, and reliably apply those to the
2 facts of the case to support this opinion that 67 transactions
3 were improperly accounted for. There is no analysis of 45 of
4 those transactions at all. And we can't effectively
5 cross-examine them or the government's accounting expert without
6 any indication of what the accounting analysis was.

7 **THE COURT:** Actually, I don't understand that. If it's
8 inadequate, if they don't lay an appropriate foundation, why
9 can't you demonstrate that it is inadequate and they haven't
10 laid a proper foundation? I mean, in a sense it is almost like
11 a *Daubert* hearing.

12 You know -- I think that I'm concerned about, you know, sort
13 of *seriatim* hearings here where, you know, where we're going to
14 stop the trial and bring into question something that, you know,
15 isn't -- that -- that something is simply going to -- for the
16 purposes of a delay or sort of like discovery and so forth.

17 But, go ahead.

18 **MR. GRAY:** Well, Your Honor, it's not enough that -- the
19 opinion itself is just not supported by any analysis. And so,
20 it wouldn't be proper to allow the expert to offer the opinion
21 that there was 67 transactions that were improperly accounted
22 for.

23 Your Honor, I also want to talk to you about the list of
24 Autonomy's top contracts and top customers.

25 **THE COURT:** Before we get there, let's try to finish this

1 point.

2 **MR. GRAY:** Sure.

3 **MR. LEACH:** This is about notice, Your Honor. This is
4 contending that they don't have notice about what Mr. Brice is
5 going to testify about or the transactions that he thinks are
6 inappropriately accounted for and will offer opinions on.

7 For example, he has five categories. And by the way, there
8 is a 95-page report summarizing what his opinions are, putting
9 transactions into various buckets.

10 An example is one category, he will testify his opinion that
11 22 hosting transactions are inappropriately accounted for
12 because it's basically accelerating revenue. He has an opinion
13 on that. He's expressed it. He's given his three examples of
14 why these 22 fall into that category. And they have notice.
15 And they have cross-examination. This is -- this is -- this is
16 about notice.

17 **THE COURT:** I really do think it goes to weight, and not to
18 admissibility. If it turns out that you are right that there is
19 nothing there, there, to allow that, quote, in your view, leap
20 from X to Y, then I can take action at that time.

21 **MR. GRAY:** Your Honor, I do want to push back, though, a
22 little. This is not about notice. This is about the fact that
23 there is no underlying analysis to support the opinion. So --

24 **THE COURT:** Frequently there isn't, is there? I mean in a
25 sampling, there's not going to be an analysis of the non-sampled

1 matters.

2 Are you saying that for the 22 matters or whatever they
3 picked, there's no discussion of what was relied upon?

4 **MR. GRAY:** No, they have disclosed a range of documents that
5 the expert consulted, but there is no analysis to support the
6 extrapolation from 22 observations to 67.

7 **THE COURT:** Well, they are going to have to justify it. And
8 if they don't, they can't -- they tell me they can. I don't
9 know. If they don't and you are saying they won't be able to,
10 fine. Then I can stop him, dead in the water.

11 **MR. GRAY:** Okay.

12 **THE COURT:** Okay?

13 **MR. GRAY:** Sure.

14 **THE COURT:** But I'm not going to stop them in advance dead
15 in the water, and I'm not going to have a *Daubert* hearing on it,
16 because it doesn't seem appropriate.

17 Now we are on to the top 40.

18 **MR. GRAY:** Yes, Your Honor. The second issue, Mr. Brice's
19 discussion of the lists of Autonomy's top contracts and top
20 customers should be excluded because it's not expert opinion.
21 His analysis entails nothing more than simply comparing two
22 spreadsheets or two lists with his eyeballs, and simply noting
23 the apparent omissions. That is not an exercise that requires
24 any demonstrable expertise. It's certainly not an exercise that
25 lies beyond the province of an ordinary juror.

And in addition, it would be unfair to permit Mr. Brice to offer that testimony as an expert because it would lend his views unmerited creditability and weight.

For those reasons, I would ask that Mr. Brice not be allowed to opine about the lists of Autonomy's top contracts and top customers.

MR. LEACH: This is complicated evidence, Your Honor.

Without summaries, without some analysis of what these very complicated documents mean, it becomes very difficult for people to follow and to understand. I'm not sure exactly what bucket this falls into.

But we are perfectly fine with an instruction that says:
This aspect of Mr. Brice's testimony is not expert testimony;
you shouldn't lend any weight to his status as an expert because
of that.

But it's critical to find a way to --

THE COURT: Well, I'm a little confused here. I was with you until you said it's not part of his expert testimony. What's he doing? You are either an expert or you're a percipient witness. You're not -- you are not a volunteer to opine on -- you know, you don't come in off the street: Well, let me tell you what I think. You know, that is not who what this is about. So I'm confused. Maybe regroup on that one, because that doesn't make sense to me.

(Off-the-Record discussion between counsel)

1 **MR. GRAY:** Your Honor, this is a very important part --

2 **THE COURT:** What I don't understand is why an expert can't
3 give -- say: By way of example, I want to say let's take these
4 20 customers, or 40 customers, or whatever it is. This is --
5 and here they are. Looking at the records, that's what I glean,
6 that they're the top 40 customers. Now, let me tell you
7 something about them in terms of the accounting.

8 And he says: Da, da, da, da, da, da. And he gives his
9 opinion that there was -- where -- why it's significant. Maybe
10 it's not. I don't know.

11 So I think it is a question of -- it's -- isn't it by way of
12 example to illustrate his expert opinion as to whether something
13 occurred or not? I thought it was. But if you're telling me
14 it's not --

15 **MR. LEACH:** I have no desire to bolster this evidence
16 through an expert opinion, Your Honor. We have other means to
17 get this in, and so we're perfectly fine if this aspect of
18 Mr. Brice's work does not come into evidence through him.

19 **THE COURT:** Fine, they're agreeing not to do it. Thank you,
20 you won.

21 **MR. GRAY:** Thank you, Your Honor.

22 **THE COURT:** That's two out of three.

23 **MR. GRAY:** Two out of two.

24 **THE COURT:** How many?

25 **MR. GRAY:** Two out of two.

1 **THE COURT:** Two out of two, I don't think so. You only won
2 half of that one. I'll give you 1.5. All right.

3 Finally, and that's the wrong word to use here, we have the
4 defense motion for discovery.

5 **MR. KEKER:** There's really two of them. We filed one on
6 December 8, and we filed another one in January. And I'm -- the
7 first one --

8 **THE COURT:** Which one are we now -- what is it that you want
9 to discuss?

10 **MR. KEKER:** The first one I want to talk about is --
11 involves *Brady/Giglio* issues for credibility. And what I want
12 to tell the Court is that the government's prime witness,
13 Stouffer Egan, CEO of the Americas of Autonomy Corporation, who
14 did most of the deals that you are going to hear about, Stouffer
15 Egan coming to people and doing things. He has been interviewed
16 four times by HP lawyers. He's been interviewed, that we know
17 of, eleven times by the government.

18 The breadth of the interviews has resulted in a radical
19 change in his testimony over time. And it has resulted in an
20 extraordinary deferred prosecution agreement which he finally
21 got when they got his -- when his testimony got straight so the
22 government wanted to give it to.

23 Him. And what's extraordinary about the deferred
24 prosecution agreement is that they have attached his script.
25 Exhibit B says if you want to keep your -- you know, you have to

1 do what we -- what we tell you in the deferred prosecution
2 agreement, and here's how you are going to testify.

3 So it's got a script attached to it. Needless to say, we'll
4 bring all of that out on cross-examination.

5 We are seeking as *Brady/Giglio* material, given this
6 extraordinary cooperation with the government, a list of all the
7 meetings that they have had with him or his counsel --

8 **THE COURT:** They?

9 **MR. KEKER:** "They" being the government, the prosecutors,
10 the meetings that they're having with him that aren't recorded
11 in a 302. If we have got a 302 or if we have got --

12 **THE COURT:** I'm sorry, let me just get his -- I need to know
13 exactly what you want.

14 You want the government to provide you with a list of
15 meetings that they had with -- now, is it with the witness?
16 With Hewlett-Packard? With the attorneys for Hewlett-Packard?

17 **MR. KEKER:** No, with Egan and his counsel. His counsel is
18 Mr. Ehrlich, Miles Ehrlich.

19 **THE COURT:** So you want a list of all the times that they
20 met with the witness and -- who is accompanied by his counsel or
21 not accompanied by his counsel.

22 **MR. KEKER:** Correct, but we know of 11 of them because we
23 have got 302s. What we are asking for are the meetings where we
24 don't know there was a meeting, and how long it lasted.

25 For example, we would like to know, because his testimony

1 has changed over time, we would like to know what meetings were
2 held with -- maybe with his counsel, because that's the way this
3 works. The government says: We're very dissatisfied with what
4 he's saying, we think he's liar, go back and -- blah, blah.

5 And then the next time the guy comes in who wants a deferred
6 prosecution agreement or immunity, all of a sudden his testimony
7 is different than it was before, and is more in line.

8 We can't get at that with him because of the attorney/client
9 privilege. But we certainly can bring out to the jury the
10 series of meetings that we are concerned about. And if any
11 notes were taken at those meetings we would like them. And we'd
12 also like -- not "like," we're asking for all drafts of this
13 deferred prosecution agreement which includes the script that's
14 in the back, in Exhibit B. "Here's what you are supposed to
15 say."

16 We would like to see how that developed. And we believe
17 that's is *Brady/Giglio* material. And then we would like, of
18 course, any agreements that or promises that have been made to
19 Mr. Egan or his counsel that aren't revealed in the deferred
20 prosecution agreement. And we would like as they go into trial
21 preparation -- I'll explain this separately.

22 We would like that basically for all the other witnesses
23 too, because there is something extraordinary going on here,
24 Your Honor, in my experience. They are giving the lawyers for
25 the witnesses whom they have immunized and made agreements with,

1 they are giving the lawyers for the witnesses the 302s and the
2 witness interviews that -- that we have, too, to make sure that
3 the lawyers know what their clients have said before, according
4 to the FBI agent who wrote the 302 or the lawyer for
5 Hewlett-Packard who wrote the memo. And they're giving them to
6 them with a request that the lawyers don't show these to the
7 client.

8 Well, okay. Fine. I'll assume that the lawyers are abiding
9 by that. But there's nothing to keep them from saying: Here's
10 what the 302 says, here's what you -- they say you said before.
11 Here's what -- here's -- no, you can't say that, as I prepare
12 you for testimony you can't say that because this is what the
13 FBI guy wrote down before.

14 We should get all of that under *Brady* and *Giglio*. They have
15 provided us in the main with a -- let's back the truck up and
16 dump it all and you find the *Brady/Giglio*, which is fine. I'm
17 not complaining about that. We are.

18 But this, we can't get at. And it is clearly evidence that
19 goes to the credibility of these witnesses. Or could.

20 **MR. REEVES:** I think we produced a lot of this stuff,
21 Your Honor. And I think the Court was exactly right to be
22 specific in the questions.

23 I'm not aware of any meeting with Mr. Egan for which there
24 is an, A, FBI 302 report which has not been produced.

25 We have gone further, although not required to do so by

1 Rule 16. I have produced my notes, my work product, made it
2 available to the defense to review of my meetings with Mr. Egan.
3 Okay. We have gone further still. We have produced emails of
4 our email dialogue with Mr. Egan's counsel. They can glean from
5 those if they wish, if it is relevant to them, meetings that we
6 have had with counsel.

7 I will not, unless the Court orders me to do so -- and I ask
8 you to please not do that -- I will not prepare a list of the
9 times I met with Mr. Egan's counsel or spoke to them on the
10 telephone.

11 And otherwise, all the information that counsel is seeking
12 has been produced.

13 **MR. KEKER:** So this, this ought to be granted, and, and to
14 the extent it turns out later that Mr. Reeves has forgotten some
15 of these things, then it's on him. This ought to be granted.
16 This is why we asked for a *Brady* order.

17 **THE COURT:** I'm not quite sure, but I think what you are
18 saying is what I should grant is an order directing the
19 government to produce all *Brady* and *Giglio* material. That is
20 what you are asking.

21 **MR. KEKER:** Yes, and I'm asking specifically under *United*
22 *States versus Agurs* for these things about, about when they meet
23 with witnesses --

24 **THE COURT:** But that's -- the problem I see is that if, for
25 example, the government had a conversation with Lawyer X on a

1 particular day, and they haven't disclosed that to you, you
2 would argue that that's -- that that's a failure to disclose
3 potentially *Giglio* or *Brady* material.

4 **MR. KEKER:** We would.

5 **THE COURT:** Right. I think that really invites, it takes an
6 event. And it charges it in a sense that it's a *Brady-Giglio*
7 event, when I'm not sure it is at all. I'm just not sure it is
8 at all.

9 So you could say the way to be cautious about this -- I
10 appreciate it -- is to tell us all the events, and then we can
11 make a determination whether it is *Brady* and *Giglio*, because it
12 could be. And the answer is yes, it could be. I understand
13 that.

14 But to burden the government, especially in an investigation
15 of this type, in which it was far-reaching, existed over two
16 years, involved -- I don't need to exaggerate, but my guess is
17 hundreds, perhaps even a thousand contacts with various counsel,
18 parties and so forth, over the period of time, and to charge
19 them with a potential *Brady* violation, if they failed to
20 disclose the contact, seems to me an enormous burden to put on
21 the government, and one that I'm not willing to do.

22 I am willing because of course you have to, and it's
23 appropriate, to say: Look. You had a contact with Witness X.
24 Why -- and in that process, there was *Brady* or *Giglio* material
25 created. You didn't turn it over. That's a violation.

1 Yes, indeed. That could be a violation. Whether it's a
2 material violation or not depends on what it is. But I'm not
3 going to enter an order, I'm not -- though I understand your
4 concern, I'm not going to enter an order. They have their
5 obligation. If it turns out that they haven't fulfilled their
6 obligation, obviously I'll deal with it.

7 And I would also say, in the context of this case, a lot of
8 material was turned over. Counsel has been able to devote
9 substantial resources to the development of the defense case.
10 Witnesses will be brought forward. Cross-examination will be
11 expansive. And full.

12 I would be surprised -- though I'm always surprised, but I
13 would be surprised if, in fact, the defense couldn't ferret out
14 a *Brady* violation or a *Giglio* violation if it occurs. Now, I
15 understand "How do you know about something that you don't know
16 about?" is always a problem.

17 But the contrary is: Well, the government has to say what
18 they did at every moment of their investigation, who they talked
19 to, and exactly what was said. And I think that side of the
20 equation places too much of a burden on -- on the government.

21 **MR. KEKER:** Let me back off --

22 **THE COURT:** And I also would say I don't know of any
23 authority to support that type of order --

24 **MR. KEKER:** Let me back off about everybody except Mr. Egan.
25 You have just been told that all the contacts that they have had

1 have been reported to us. That doesn't seem like too much of a
2 burden.

3 Mr. Egan is a terribly important witness. If they are going
4 to be meeting with him between now and the evidence, before now
5 and his testimony, the U.S. Attorney manual and the FBI follows
6 a procedure, I believe, that if nothing new comes up in a
7 meeting, they don't make a 302 of it.

8 So they can sit for hours with Mr. Egan, and work with him,
9 and if their position is: Well, nothing here is new; there's no
10 report of it.

11 We ought to be able to find out with respect to Stouffer
12 Egan who has this extraordinary DPA --

13 **THE COURT:** What that does essentially is puts you in the
14 room, because why do a 302? Lets tape-record it. Let's make
15 sure we are completely accurate, completely complete. It
16 basically puts the defense in the room with the government as
17 they are preparing their witnesses.

18 **MR. KEKER:** Well, no --

19 **THE COURT:** Well I think it does.

20 **MR. KEKER:** At least I know --

21 **THE COURT:** Oh, you will know if they meet.

22 **MR. KEKER:** How will I know?

23 **THE COURT:** You simply ask.

24 **MR. KEKER:** Ask Mr. Egan? I don't trust Mr. Egan to tell me
25 any- -- "I've met with the government a lot. I don't remember.

1 I'm sure, I mean, yes, we did meet, but I don't know how long it
2 was, I don't remember." We are not --

3 THE COURT: He's already had 11 meetings or something like
4 that.

5 MR. KEKER: I agree.

6 THE COURT: Pardon?

7 MR. KEKER: I agree.

8 THE COURT: I mean, oh, 15? Oh, 20?

9 MR. KEKER: How do we get to 15 or 20? That is what I want
10 them to they will me.

11 THE COURT: Well, ask the question. It seems -- if I hear:
12 "Gee, I don't recall, I have no idea how many times I met with
13 them in the month of February," I may take some action. I may
14 request the government to disclose that information to you.

15 Okay. Moving ahead.

16 MR. KEKER: All right, separate issue, completely separate
17 from what we were just talking about, Your Honor --

18 THE COURT: Yes.

19 MR. KEKER: -- is this issue of notes.

20 Mr. Reeves just told you that he has disclosed to us the
21 notes. The way we get these notes, of which there are 4,000
22 pages, and we're still -- we got some more in December, we got
23 some more in January.

24 We appreciate being able to see the notes, but we have to go
25 to the U.S. Attorney's office, make an appointment, have

1 somebody go down there and read the notes and take whatever
2 notes we take. It is absurd, and it's not going to work during
3 the trial. You know from trying cases that something that
4 wasn't important before, or you want to go back and check, and
5 you want it, that's why we have all these documents. We have a
6 protective order. We have asked them over and over again to let
7 us copy those notes and put them in our office and files and so
8 that we can use them in the middle of the night when we're
9 preparing cross-examination. And they won't do it. They say:
10 No, you've got to come to our office.

11 We ask you to order them to let us have copies of those
12 notes.

13 **MR. REEVES:** When we invited them to review these notes, I
14 -- I know in my dialogue with counsel on this topic, I invite
15 them to bring a Dictaphone. I expect them to take detailed
16 notes. It is their work product. I'm making our work product
17 available to them.

18 It is -- we are going above and beyond. They have already
19 come in twice and done it, at length. They got 12 lawyers --

20 **THE COURT:** These are exactly the sort of discussions I
21 don't particularly want to get too engaged in. Take notes. You
22 have -- your struggling firm can possibly --

23 **MR. KEKER:** It's not --

24 **THE COURT:** Like the new kid, you know, send him out. He
25 knows where the federal building is.

1 **MR. KEKER:** They can't take notes --

2 **THE COURT:** And send him out, have him sit there taking
3 notes and talking into a --

4 **MR. KEKER:** They can take notes all they want, and it
5 doesn't do me --

6 **THE COURT:** Yeah, but --

7 **MR. KEKER:** -- who has to be on his feet with a witness any
8 good when I need to check or look into something. This is
9 slightly absurd. It is a burden --

10 **THE COURT:** But they have given you something that I don't
11 think I would have ordered. Okay? They have gone, taken that
12 step. Now, your complaint is: Well, it's not as helpful -- and
13 true -- as if they simply just shipped them all off to me.

14 And I would say, I would say, I just don't have a lot of
15 sympathy for that argument.

16 **MR. KEKER:** Your Honor --

17 **THE COURT:** Anyway, let's move on, because I do have some
18 sympathy for other arguments that I think you will find more
19 interesting than the one that we are now pursuing.

20 **MR. KEKER:** Okay.

21 **THE COURT:** Here we are.

22 **MR. KEKER:** Yes, sir.

23 **MR. REEVES:** Thank you, Your Honor.

24 **THE COURT:** Okay. So --

25 **MR. KEKER:** Do you want to go to -- the next one is the

1 defense motion on Rule 16 *Brady* and *Giglio* for other matters.

2 There's another discovery motion.

3 THE COURT: We didn't just talk about that? What are we
4 talking about --

5 MR. KEKER: No, this is different.

6 THE COURT: Okay, go ahead.

7 MR. LEACH: This is II B under the defendant's Document 227.

8 THE COURT: Well, I thought we also were talking about
9 *Brady* and *Giglio* material. I mean it was my -- you have now
10 heard what my view is about issuing orders and so forth with
11 respect to *Brady* and *Giglio*.

12 Is there anything left to discuss that would be different
13 from what I have just discussed?

14 MR. KEKER: Well, I don't know, Your Honor. I mean --

15 THE COURT: Well then, let's go. Go ahead.

16 MR. KEKER: There is four examples that we have said is why
17 we need a *Brady* order but the examples, the specific examples
18 are: The SEC and the Department of Justice investigated, or at
19 least the SEC investigated and we believe the Department of
20 Justice investigated HP for making false statements in November
21 of 2012, more than a year after the merger when they said: Oh,
22 my Lord, we have been defrauded to the tune of \$5 billion.

23 They have no basis for saying that. Their own accountants
24 said: You don't have a basis for doing that. And disavowed it.

25 We want to know what happened to that investigation, what the

1 deal with HP was that was struck, how does it affect the
2 credibility of Hewlett-Packard witnesses.

3 So that's one.

4 So the request is for all communications from witnesses or
5 lawyers connecting, amplifying -- or excuse me, that's one.

6 The second is: Hewlett-Packard and its lawyers and
7 accountants -- and the accountants are PwC which Juror No. 1's
8 wife works at (Indicating) -- role in the preparation of the
9 Brice report. They're telling us about the triangulization
10 going through the government. We want to know what direct
11 contact there was between Hewlett-Packard and its agents, Morgan
12 Lewis & Bockius and --

13 **THE COURT:** Well, its agents. That's a review.

14 **MR. KEKER:** I mean, lawyers and accountants.

15 **THE COURT:** Yeah.

16 **MR. KEKER:** HP and its lawyers and accountants helping Brice
17 prepare his report. Same thing with Yelland. What
18 involvement -- Yelland is the one who says: PriceWaterhouse
19 prepared these summaries for me that I want to testify about.

20 **THE COURT:** Okay, now, why is that? First of all, it seems
21 to me it is subject to cross-examination. But why is that
22 within the government's --

23 **MR. LEACH:** I have produced the government communication
24 with Morgan Lewis; I have produced the government's
25 communications with HP. We have produced the government's

1 communications with Mazars and Mr. Brice. We have no additional
2 information to disclose on that topic, Your Honor.

3 **THE COURT:** Okay. What about the first one? The first one
4 being the government's investigation of Hewlett-Packard with
5 respect to statements that it made in connection with the
6 Autonomy acquisition.

7 **MR. LEACH:** I understand what the defense is asking for,
8 Your Honor. We have produced any communication between the SEC
9 and a third party. We have produced or made available all of
10 the notes that the SEC lawyers took during interviews. We have
11 produced all of the statements made by witnesses to the SEC.
12 We've even produced SEC work product to the defendants,
13 including the SEC's action memo, including PowerPoints
14 summarizing its evidence.

15 The small category that we have not produced is exclusively
16 internal SEC dialogue about its investigation, which is entirely
17 derivative of all of its interactions with third parties, and
18 entirely duplicative of the massive amount of information that
19 we've given to the defense.

20 If there's something that they think we're missing, I invite
21 direction on this point. But honestly, given the volume that we
22 have produced to them, I have no idea what they're looking for.
23 And I have no idea how what an SEC lawyer tells to another SEC
24 lawyer could be *Brady*, *Giglio* or *Jencks*.

25 **MR. KEKER:** There was an investigation of Hewlett-Packard's

1 false statements in November -- I mean, that they were made by
2 Meg Whitman in 2012. What happened to that investigation?
3 Where are the records, where are the memos? We haven't gotten
4 anything about that.

5 **THE COURT:** Well, what they're saying, what I hear counsel
6 saying is -- he's not saying there aren't memos. He's not
7 saying there isn't a discussion among SEC attorneys as to what
8 the appropriate course of action is. To the contrary, he's
9 saying, as I read it, of course there are memos. Of course
10 there is a decision. They made a decision. I don't know what
11 -- X, Y, Z, whatever it was.

12 Well, of course, they made their decision based upon any
13 number of things, including the advice that they get from the
14 lawyers who work there. That, in my view, is protected.

15 But they have gone further to say: We're not saying the
16 investigation's not relevant. We've given you -- whatever
17 counsel has said we've given you. But we're not -- what we've
18 carved out are the internal memoranda among SEC counsel which
19 led up to the decision, whatever that decision was.

20 Fine, they don't have to turn that over. And he, government
21 counsel understands that that's what you are seeking. And if
22 you are not seeking -- if you are seeking that, it's denied. If
23 you are not seeking that, then I don't know what else you are
24 seeking.

25 **MR. KEKER:** We're seeking -- *Brady* and *Giglio* go to

1 information, Your Honor. Not just documents, not internal
2 documents; they go to information. What happened to these
3 investigations? What did DOJ do about it? What did the SEC do
4 about it? Tell us that. Why did HP get off the hook?

5 **THE COURT:** Okay, why did they get off the hook? They may
6 have gotten off the hook, I don't know if that is correct or
7 not, because one lawyer in the SEC feels they should get off the
8 hook or that it means this or that or it doesn't give -- doesn't
9 attribute wrongdoing to A, B, C, D, Fact A, B, C, D. I think
10 actually we're all communicating, we all understand what you
11 want. And I'm not going to give it to you.

12 Okay. Moving ahead.

13 **MR. KEKER:** Okay.

14 **THE COURT:** Okay. Anything else in that collection?

15 **MR. KEKER:** This is where I raise the issue of the evidence
16 and witnesses correcting their 302s. I do find it extraordinary
17 that all these lawyers for witnesses who are being prepared to
18 testify are getting the 302s, can go over them carefully, can
19 check with their clients --

20 **THE COURT:** And to all of that, I think I want to hear what
21 the cross examination is on this. I don't know -- you know, we
22 could be endless. In any investigation that takes years, we
23 could be involved in an endless trial of trying the
24 investigation. And that's not what we're doing, in my view. We
25 are not trying -- the investigation is the investigation. It

1 was either adequate or inadequate. It was either appropriate or
2 inappropriate. But that's not on trial.

3 Though, I'm not saying that the defense can't raise issues
4 as to the adequacy of the investigation. If it's appropriate
5 cross-examination. And it seems it might be, with respect to
6 particular witnesses.

7 **MR. KEKER:** Your Honor as a just jury-trial matter, the idea
8 of getting up and conducting tedious cross-examination of each
9 witness about when you met, what you did, like a deposition, is
10 something that is a non-starter in a jury trial. Their
11 obligation is to tell us information that is covered by *Brady*
12 and *Giglio* ahead of time. It's not for me to have to
13 cross-examine the witness --

14 **THE COURT:** And either they will have done it or not. I
15 understand that. And I understand --

16 **MR. KEKER:** And we will probably never find out what they
17 didn't give us, is what I'm saying. And so they have got --
18 they have got a setup --

19 **THE COURT:** Your answer to that complaint -- if I
20 understand, the answer to that complaint is take the entirety of
21 the investigation, and document it, and, and, and disclose it on
22 a -- like a day-to-day basis.

23 **MR. KEKER:** That's not what we're asking for.

24 **MR. LEACH:** It's exactly what they're asking for,
25 Your Honor.

1 **MR. KEKER:** Excuse me.

2 **MR. LEACH:** In their motion, they are saying we met with
3 witnesses last week. "Where is the 302 for that? Tell me how
4 long that meeting lasts."

5 That is exactly what they are asking for. And it is exactly
6 the assumption that the government is not going to prepare a 302
7 in the ordinary course of what it does.

8 **MR. KEKER:** That is exactly what we're talking -- we are not
9 talking about going through your whole investigation. We are
10 saying: When you met last week with a witness, and the witness
11 said "The witness statements you sent me are wrong," tell us.
12 Write it down. Do something. Give us notes. Tell us.

13 **THE COURT:** I got it. I have to make a decision here. It
14 has to be tried in my lifetime. It will be.

15 **MR. KEKER:** Well, that --

16 **THE COURT:** In both our lifetimes.

17 Okay. Now we go to -- where are we now in this collection
18 of 300 motions?

19 **MR. KANIG:** Your Honor, I believe that the defendant's
20 motion for review of the HP and Morgan Lewis's files by the
21 government is up next.

22 **THE COURT:** And the answer is no. I'm not going to grant
23 it. It is not an obligation of the government to look at the
24 files. I understand the theory. So it's not like -- the theory
25 is essentially that these people are acting as agents of the

1 government. Right?

2 **MR. KANIG:** Correct.

3 **THE COURT:** And, like the police department or this or that.

4 **MR. KANIG:** (Nods head)

5 **THE COURT:** And therefore they have a duty to review the
6 files of the private -- the non-governmental entity.

7 **MR. KANIG:** That's right, Your Honor.

8 **THE COURT:** Okay and I'm denying it because I don't find
9 them to be the agents in the sense that it gives rise to that
10 duty. I appreciate the argument. It's -- this isn't the first
11 time I have heard the argument. Okay? But it will be the last
12 time today.

13 **MR. KANIG:** Well, Your Honor, if I could just point to
14 something you said at the last hearing --

15 **THE COURT:** Oh, you are going to -- you are going to impeach
16 me by my own -- by my own statement.

17 **MR. KANIG:** No, Your Honor, I would never seek to impeach
18 you. I just want to point to a statement that you made at the
19 hearing last year.

20 **THE COURT:** Sure, go ahead.

21 **MR. KANIG:** You said that at some point the government
22 crosses a line with requests they make to a private party and
23 that makes them members of the prosecution team. And --

24 **THE COURT:** And actually I'm going to get to that in a
25 minute. But it's not this -- it's not this case. It's not

1 this. I am -- I know the suspense is killing us all, so let me
2 get to it right away.

3 I am interested in the question of two witnesses coming to
4 the United States who are the witnesses from Deloitte. And I
5 would like to sort of address that because I think that's an
6 issue that I want to try to determine now, because I think it's
7 an important issue. And not that anything that has been said
8 here is any less important. But I want to deal with that. And
9 I think I want to start out by saying that I need to inquire of
10 the government -- I have before me the motion of the defense to
11 take steps that will ensure the presence of two witnesses,
12 Mr. Knights and Mr. Mercer, two witnesses who are employed by --
13 or were, I don't know their present status -- by Deloitte, who
14 are outside the subpoena powers of the Court. That's the --
15 that's the motion. Okay.

16 And what they assert are a couple of things. Number one,
17 that they are material witnesses. I assume they're important,
18 but I don't know how important they are in the context of the
19 entire case.

20 **MR. KEKER:** They were the audit partners, one through 2009
21 and the other starting in 2010. These are the audit partners
22 that Mr. Hussain had to report to on these transactions. And
23 they're the ones who approved it, approved the accounting. They
24 couldn't be more important.

25 **THE COURT:** So I don't know that the government would take

1 the position that they are unimportant or not material. But it
2 appears that they are important and are material. Which is not
3 the same thing as -- well, that's enough to say on that.

4 Now, turning to the second, to their argument, because their
5 argument isn't: Judge, you ought to expand the subpoena powers
6 of the Court, because I can't, and I wouldn't, and that doesn't
7 work. Their argument is a different argument. Their argument
8 is that the government executed an agreement with Deloitte that
9 provided for certain things. As a result of that agreement,
10 they are under an obligation, if requested by the defense, to
11 take steps to bring about the attendance of these two witnesses.
12 I think that's their argument in a nutshell.

13 So, of course, I looked at the agreement. The agreement,
14 it's an exhibit. It's a Latham & Watkins letter to Mr. Reeves
15 of April 28, 2016.

16 So we're all in agreement that that's the agreement? That's
17 the letter that we're all talking about?

18 **MR. KEKER:** Yes.

19 **MR. REEVES:** Yes, Your Honor.

20 **MR. LEACH:** Yes, Your Honor.

21 **THE COURT:** Okay. And my first question, Mr. Reeves, is:
22 If the government wanted and felt it was in their interests in
23 the production -- in their proof of the case to have either or
24 both of these witnesses, is it correct that their attendance
25 would be subject to the terms and conditions of the letter of

1 April 28th?

2 **MR. REEVES:** Yes, Your Honor.

3 **THE COURT:** Okay. So, in other words, if you want either
4 Mr. Knights or Mr. Mercer to appear in this action, what you
5 have to do is send a letter -- I don't know, is that the right
6 word?

7 **MR. KEKER:** Send a subpoena.

8 **THE COURT:** Send a grand jury or trial subpoena by email to
9 Latham & Watkins, asking that they -- asking -- I don't know --
10 demanding, whatever word you want to use, their presence at
11 trial. And it is your understanding that pursuant to this
12 agreement, they would appear at trial and testify at trial.

13 Is that correct?

14 **MR. REEVES:** That is largely correct. There are a few
15 nuances, Your Honor.

16 **THE COURT:** Okay, let's go to the nuances.

17 **MR. REEVES:** First I think there is going to be an abundance
18 of Deloitte-related auditing evidence.

19 **THE COURT:** Okay. So you say it's cumulative.

20 **MR. REEVES:** It will be cumulative.

21 **THE COURT:** That is not a test for you. I'm now not -- I am
22 not focusing on the defense. I'm focusing on the government. I
23 want to see what the government believes to be its rights with
24 respect to this agreement.

25 **MR. REEVES:** If we ask them, they will come, Your Honor.

1 And I think the concept is that within the government's
2 case-in-chief, that if we asked for one, two, three or four of
3 the witnesses listed in the letter, that they would come. And I
4 have --

5 **THE COURT:** By the way, that is not limited to
6 case-in-chief, is it?

7 **MR. REEVES:** It is limited --

8 **THE COURT:** In other words, if we get into rebuttal you can
9 also use this agreement to bring them as rebuttal witnesses.

10 **MR. REEVES:** Hmm, let me offer the following. I think --
11 the bottom line is, in our case, we sought this agreement from
12 Deloitte in order to --

13 **THE COURT:** Yeah, but it's not limited. Is it? I mean, I
14 don't see a limitation.

15 **MR. REEVES:** I think, as to a rebuttal case, I think it was
16 never really discussed or contemplated, and the only reason --

17 **THE COURT:** Well, just look at the words. And by the way,
18 this is by the bye. In other words I don't think it really
19 makes any difference whether you said in the case-in-chief or
20 you said throughout the trial, but since you raise it and you
21 are looking at nuances, I -- I just, I look at it and see that
22 --

23 **MR. REEVES:** I raise it because it's a point that the
24 lawyers for Deloitte have made. Okay? And so, just to sequence
25 this, Your Honor --

1 **THE COURT:** Well, look at the agreement and tell me, in the
2 agreement, am I look -- is there something that I'm missing that
3 -- that limits the scope of the agreement to the case-in-chief?

4 **MR. REEVES:** I need to get a copy of the agreement.

5 **THE COURT:** Yeah, okay, let's do that, because I want to
6 work off the agreement.

7 **MR. KEKER:** Here, here.

8 (Document tendered)

9 **MR. REEVES:** Thank you. Thank you, John.

10 Okay. So I think the relevant portion, having contributed
11 to the language here, is Subparagraph C as to the individuals
12 Knights, Mercer, Welham, and Murray, appearing in person at any
13 trial or any proceeding as requested by the office and
14 testifying truthfully.

15 **THE COURT:** That is not limiting.

16 **MR. REEVES:** I accept that.

17 **THE COURT:** Okay, so I look upon this that a trial's a
18 trial, and it goes from A to B, A to Z, whatever we want to say.
19 And it includes every stage of the proceeding.

20 Because if X came out during the course of
21 cross-examination, or the defense case, I couldn't believe that
22 the government wouldn't -- and you thought Mr. Mercer,
23 Mr. Knights, could clear it all up or present other evidence, I
24 can't believe you wouldn't trot out the agreement and say: We'd
25 like this person to come in next week or two weeks. I'm sure

1 you would.

2 Anyway, I think that's all by the bye, because I don't see
3 anything limiting in it and it doesn't make any difference to
4 our argument. Because I don't think you could -- I don't know
5 that you -- maybe you could have written the document to say
6 that these people will cooperate in the case-in-chief as
7 presented by the prosecution. Yes, you could say that, and that
8 might raise a different kind of issue.

9 But it doesn't say it, so why bother?

10 Now, here is my concern, because we haven't gotten to that
11 yet. You would agree with me, wouldn't you, that all that is
12 necessary for you to bring these witnesses to the United States
13 to testify is to email a trial subpoena. And when I say that,
14 all I'm saying is from the government's point of view, the
15 burden on the government would be to send an email. Period,
16 full stop, end of discussion.

17 Is there any other burden that is imposed on you in order to
18 ensure their presence?

19 **MR. REEVES:** In our judgment, no, Your Honor. You are
20 absolutely correct.

21 **THE COURT:** Okay.

22 **MR. REEVES:** And that's exactly what we did do.

23 **THE COURT:** Oh. Then I have missed this.

24 **MR. REEVES:** Let me --

25 **THE COURT:** That you have subpoenaed these people?

1 **MR. REEVES:** I have requested them to appear. So let me
2 just explain.

3 **THE COURT:** Oh. Why did I go through that long-winded
4 discussion if they're going --

5 **MR. KEKER:** They did not send a subpoena.

6 **MR. REEVES:** I'm happy to send a subpoena.

7 **THE COURT:** Oh.

8 **MR. REEVES:** But I think there is a disagreement. Okay?

9 And --

10 **THE COURT:** Okay, all right, let's -- okay. And I'm sorry,
11 I didn't know that to be the case. All right.

12 **MR. REEVES:** Attachment B to our response is precisely the
13 type of email the Court is alluding to.

14 It is a request by --

15 **THE COURT:** I'm sorry I didn't read that, and, I should have
16 read that.

17 **MR. REEVES:** That is okay.

18 **THE COURT:** Not really okay. What is your response? What
19 have you done?

20 **MR. REEVES:** Let me just explain, if I could. I have asked
21 Deloitte for Mr. Knights and Mr. Mercer to come. I made it
22 clear in my request that we were relaying a request from the
23 defense, all right. This is also --

24 **THE COURT:** Oh, I don't know. Well, that's a big
25 difference, right there.

1 **MR. REEVES:** Well, it's true. We are relaying their
2 request, because we -- we're deciding what witnesses we would
3 like to call.

4 Parenthetically, Lee Welham, the manager, the No. 2 in the
5 audit, spans a longer period of time than the two engagement
6 partners. Among other considerations, there's utility in using
7 him. This is a long trial --

8 **THE COURT:** Mr. Reeves.

9 **MR. REEVES:** Uh-huh.

10 **THE COURT:** Let me try to take this in pieces.

11 **MR. REEVES:** Sure.

12 **THE COURT:** The first piece is -- the government says it's
13 already done.

14 **MR. KEKER:** Can I pass up what they have done, Your Honor
15 (Indicating) ?

16 **THE COURT:** Yes. Show it to Mr. Reeves.

17 **MR. KEKER:** (Inaudible) their opposition. That's the memo.
18 (Document handed up to the Court)

19 **THE COURT:** No, I have their opposition.

20 **MR. KEKER:** And that is Exhibit B, and that is what he says
21 he's done.

22 **THE COURT:** Okay, let me just, let me read this. Okay.
23 Have you seen this?

24 **MR. REEVES:** I wrote it.

25 **THE COURT:** It's yours, you wrote it. Okay. Well, have you

1 seen it, though? Okay.

2 (The Court examines document)

3 THE COURT: All right. I think that this should be marked
4 as an exhibit in these proceedings.

5 (Court Exhibit 1 marked for identification)

6 THE COURT: So let's start with the first question: Is a
7 request the same thing as a subpoena? And the letter of April
8 28th uses both terms. In the beginning it talks about a
9 request, and at the end it talks about service of a subpoena.

10 So, is it correct that the government would have no
11 objection to emailing to Latham & Watkins a trial subpoena for
12 these individuals to appear?

13 Is that correct? Have I got that?

14 MR. REEVES: Yes, that's correct.

15 THE COURT: No objection.

16 MR. REEVES: We are happy to do that.

17 THE COURT: Okay, then they do it. That's fine. That will
18 be the order of the Court.

19 Next -- I don't know, so I don't want to have to decide
20 issues today that I don't have to decide -- is if they refuse to
21 comply. That's a totally different issue. And I understand
22 that the defense will take the position with respect to that.

23 I think what I would like to do is in your cover letter or
24 however you are going to it, request that these individuals
25 reply by a particular date, whether they'll appear. Pursuant to

1 the April 28th letter and the enclosure.

2 MR. KEKER: Could we --

3 THE COURT: If they say yes --

4 MR. KEKER: Could we have that date be --

5 THE COURT: Yeah, well, we'll figure it out.

6 MR. KEKER: The 22nd or something.

7 THE COURT: Well, we will figure out when to do it.

8 If they say yes, then, that's a -- that issue is taken care
9 of. And if they say no, then I have to deal with the Court's
10 role, if any, if any, in compliance with the April 28th letter.
11 Okay?

12 MR. REEVES: That's fine.

13 THE COURT: So let's now talk about the day -- today is
14 February something or 'nother. 6th? 7th? I don't know what
15 the date is.

16 MR. KEKER: It's the 6th.

17 MR. LEACH: The 6th, Your Honor.

18 THE COURT: Okay. So you will send out the letter in the
19 next 24, 48 hours. And I assume that you can get a response by
20 -- when do you want to know? I know you want to know early, but
21 I'm not even going to be here. So --

22 MR. KEKER: I think we ought to know so that we can plan
23 enough in advance of the pretrial conference, which is the 23rd.

24 THE COURT: Yeah.

25 MR. KEKER: So if they will get us the answer by the 18th or

1 19th, --

2 THE COURT: Just ask that they will respond to you by the
3 18th or 19th.

4 MR. REEVES: I will ask them to do that. I think we already
5 know the answer, but I'm happy do that.

6 THE COURT: Well, I guess I'm the only one in the court in
7 suspense.

8 MR. KEKER: Well, no, Mister --

9 THE COURT: That is okay, that is all right because I sort
10 of like suspense.

11 MR. KEKER: Good. Then, to add to the suspense, I would --
12 I mean, just, I hope that they will tell -- we'll tell
13 Mr. Farrell, we'll tell Mr. Farrell.

14 If Mr. Farrell doesn't want the auditors who worked with
15 Mr. Hussain talk to the audit committee and so on to come over
16 here, and if he obstructs that, we are going to ask for
17 sanctions, we are going to ask for testimony from him and from
18 -- anyway. We will see --

19 THE COURT: This is Mr. Keker's King Lear moment.

20 MR. KEKER: Right. Sorry. I have a lot of King Lear
21 moments.

22 THE COURT: It's okay, I sort of like to see it, because,
23 because I'm a fan of King Lear. But we won't go there yet. We
24 can just -- we can wait for the Ashland production. Okay. All
25 right. Fine. Okay.

1 So we have sort of taken care of that issue.

2 **MR. REEVES:** I'm going to email two subpoenas.

3 **THE COURT:** Well, do what you said you are going to do and
4 that's fine.

5 **MR. REEVES:** And I'm going ask for a response by the 18th or
6 19th. Thank Your Honor.

7 **THE COURT:** Trial subpoenas.

8 **MR. REEVES:** Trial subpoenas.

9 **THE COURT:** In compliance with the --

10 **MR. REEVES:** With the letter agreement.

11 **THE COURT:** Okay. Then I think you need to have a return
12 date of when they would appear. I mean, is that by agreement of
13 the parties? Or something like that? Because they are not --
14 they are not going to call them in their case-in-chief.

15 **MR. KEKER:** If we call them in our case-in-chief we will
16 work with their counsel whom we're in touch with, Mr. Farrell,
17 to give him notice of the date and so on.

18 **THE COURT:** All right, it will be like any other subpoena.

19 **MR. KEKER:** Yeah.

20 **THE COURT:** That by agreement they can --

21 **MR. REEVES:** I propose a date in April and I can confer with
22 counsel about --

23 **THE COURT:** Confer. Whatever date -- well, actually,
24 whatever date the defense wants.

25 **MR. KEKER:** Well, it's when the defense case starts is when

1 we want them.

2 THE COURT: Yeah.

3 MR. KEKER: And --

4 THE COURT: Well, think about that. I mean you can talk
5 about that.

6 MR. KEKER: We will.

7 THE COURT: Okay. So we dealt with that.

8 MR. LEACH: (Nods head)

9 MR. KEKER: The next motion is the defense motion for
10 defense witness immunity, Your Honor, which has some
11 similarities.

12 THE COURT: It also has some dissimilarities.

13 MR. KEKER: I agree. I agree.

14 THE COURT: Okay.

15 MR. KEKER: Your Honor, this motion involves the government
16 using immunity and other agreements, including the deferred
17 prosecution agreement, to cherry-pick the evidence in the case.
18 They have alleged a long list of co-conspirators who are outside
19 the subpoena power of the Court, as we've said.

20 Those witnesses all have favorable testimony to give that
21 would directly contradict evidence that comes in in the
22 government's case.

23 The -- they brokered a deal with, as we just talked about,
24 with Deloitte, and cherrypicked certain witnesses there. It's a
25 huge case, as the Court knows, in which basically they are

1 saying everything that Autonomy did or most things that Autonomy
2 did with respect to accounting was a fraud, that many people are
3 part of it. And they have identified several of those people
4 who, as I say, are outside the subpoena power of the Court.

5 We think that justice requires that all of the impugned
6 witnesses should be heard.

7 They have already said, the government has said that they
8 are going to be using -- arguing that these are co-conspirators
9 and that they get to put in what they want of what they said or
10 did, and that we shouldn't be able to respond. That's not fair.

11 **THE COURT:** I don't know that they have said that. Have
12 they said that? I don't --

13 **MR. KEKER:** Well, they said in opposing this defense witness
14 immunity, they're saying that: We get to put in -- we say who
15 the co-conspirators are, we get to put in statements from them.
16 And you can't put in any other statements from them.

17 What we are saying is: Let us have these people as
18 witnesses. Unless we can call whatever ones of these witnesses
19 we could persuade to come, then we're not going to be able to
20 have a fair trial.

21 This in-camera declaration, we haven't seen it. We think
22 that it should either be shown to us or stricken. It is
23 designed to intimidate witnesses because they don't know what --
24 I mean, what's the government saying about us in private.

25 If they claim that they still want to prosecute these people

1 you should ask them: Why in the world haven't you done it?

2 If they say they have the evidence all ready to prosecute
3 anybody, again: Why haven't they done it?

4 And more importantly, giving these people use immunity won't
5 make a bit of difference because they already have the evidence
6 in the can, which, we believe they don't, but that would be the
7 answer to it.

8 And if they don't have the evidence to prosecute these
9 people, then whatever is in that declaration is just baloney.
10 They are not going to get it.

11 And the standard we believe and we've cited is *Straub* -- we
12 hold -- the Ninth Circuit case -- for the defendant to compel
13 use immunity, the defendant must show the defense witness's
14 testimony is relevant. We have done that. And you will see
15 that more as the case goes on.

16 And then either they intentionally caused -- which we think
17 they have by their conduct. But the one we are really relying
18 on is the prosecution granted immunity to government witness
19 Mr. Egan, the CEO of the Americas who did most of these
20 transactions, in order to obtain that witness's testimony -- and
21 I'm equating immunity in the DPA -- but denied immunity to a
22 defense witness whose testimony would have directly contradicted
23 that of the government witness. And all of these people would
24 directly contradict Mr. Egan's testimony.

25 So we believe that we are entitled to defense witness

1 immunity for the people designated. I'm not saying because of
2 the publicity problem.

3 They have also offered a safe passage letter, that is as far
4 as they have gone. If we don't get the defense witness
5 immunity, we would like you to get them to commit, give us safe
6 passage letter so we can try to work with that. But what we
7 need to get them here is defense witness immunity, I think.

8 **MR. FRENTZEN:** Thank you, Your Honor.

9 The defendant has failed to show the exceptional
10 circumstances in this particular case exist. It fails on
11 basically every level of the appropriate test.

12 If the Court considers what's been presented to it, it has
13 not been presented with any actual relevant contrary evidence.
14 What it's been presented with is blanket statements by counsel
15 for these various individuals that are effectively self-serving,
16 blanket exculpatory statements, like: Autonomy did nothing
17 wrong; there's nothing wrong with the accounting at Autonomy.

18 And that's it. There's been no demonstration that any of
19 these witnesses would provide any particular contrary or
20 relevant testimony to the testimony that the government seeks to
21 present.

22 This is not an example of cherrypicking. This is simply an
23 effort to get a bunch of alleged co-conspirators and co-workers
24 currently to have immunity to come in here and then, frankly,
25 say whatever it is they want to say.

1 There is -- in terms of the legal test, in the government's
2 view, there is the important ruling the Ninth Circuit has
3 recognized, with approval, the Second Circuit's test in *Turkish*,
4 which basically says if somebody is the potential target of an
5 investigation, subject of an investigation, then that process
6 should not be interfered with.

7 We provided a declaration to the Court. I don't know that I
8 need to make more comment on it than that, other than that what
9 was contained in there was absolutely accurate and correct. So
10 it fails on those grounds. And I think that's pretty much the
11 full extent of the test.

12 I'm happy to get into this in more detail. But I think the
13 other aspect of this that's problematic outside of just the
14 legal test from the government's perspective, is, you know, if
15 you take at face value the representations, in other words, what
16 counsel for these prospective witnesses supposedly are saying
17 that their clients are going to say, they are as the government
18 has described them, and there was in the reply no contrary
19 description. They're just sort of blanket denials of any
20 wrongdoing.

21 Now, as the Court knows and as we have had hearings about in
22 the past, it's not enough to come in and say: I want to take
23 the Fifth.

24 In other words, prior to that, there has to be an assertion
25 that the testimony, in and of itself, is something that would

1 require an individual to take the Fifth. It is not enough to
2 say: Well, the government has an investigation.

3 So prior to -- in other words, there is absolutely nothing
4 in here, in this representation, that would require immunity in
5 the first place.

6 In other words, if they're going to come in here and say "We
7 did nothing wrong," which is all that the Court has in front of
8 it at this particular time, based on the filing by the defense,
9 and again, it's bare-bones, and it's not the prospective
10 witnesses saying something; it is their counsel. And it's -- it
11 appears to be taken from various filings. We're not even at the
12 point where immunity should be conferred on these people. If
13 they are going to come in here and say: "I did nothing wrong,"
14 then that's perfectly fine.

15 Now if they are going to come in here and say: "I need
16 immunity because I did something wrong," well, let's talk about
17 it. Then, that's a different analysis. But we think the --
18 legally, the test is the same, which is to say, based on *Turkish*
19 and the Ninth Circuit approval of *Turkish* and I think the name
20 of the case escapes me right now, I think it's *Condo, United*
21 *States versus Condo*, it is cited in our papers, we go no
22 further. And there is no Ninth Circuit case, certainly that I
23 can find, in which *Straub* was applied in contravention of *Condo*.

24 In other words, where the Ninth Circuit said these are
25 targets of the investigation, potential targets of the

1 investigation, and we're going to hold that the test is the
2 same.

3 In other words, every case we can find is distinguishable
4 just on that basis, but even getting to the *Straub* test, this is
5 nowhere near enough to force the government to immunize the
6 witnesses.

7 Unless the Court has any specific questions, that's all I
8 have.

9 **THE COURT:** I don't.

10 **MR. FRENTZEN:** Thank you, Your Honor.

11 **MR. KEKER:** What I just heard is that they filed some secret
12 pleading that says these people are targets.

13 **THE COURT:** Yes.

14 **MR. KEKER:** Then I heard that they can come in, that they
15 can't take the Fifth, because --

16 **THE COURT:** No, he didn't say that.

17 **MR. KEKER:** He did say that.

18 **THE COURT:** He said that if they do take the Fifth, they
19 have to have a basis for taking the Fifth. And that is
20 something that has to be explored at the time that they assert
21 the Fifth.

22 **MR. KEKER:** And that's wrong. If these people don't --
23 there is no right in this court, the prosecutors' or anybody
24 else's, to explore the basis of people taking the Fifth who the
25 government has already said are targets of the investigation.

1 It's --

2 THE COURT: Well, that may be sufficient, in and of itself.

3 MR. KEKER: But they don't have to explain that to you.

4 They say "I'm not going testify, I'm going to assert..." And
5 let me add, their witnesses have taken the Fifth and they have
6 given them immunity, and their witnesses --

7 THE COURT: Yeah.

8 MR. KEKER: Okay.

9 THE COURT: Not talking about those people. You are not
10 talking about the people that are already immunized, you are
11 talking about people who have yet to be immunized, right?

12 MR. KEKER: What I'm talking about is the cherrypicking of
13 witnesses by the government, that's exactly what's wrong, as
14 described by *Straub*.

15 THE COURT: And what counsel is saying --

16 MR. KEKER: And --

17 THE COURT: Okay, he denies it. But that's not the point.
18 That is not the test, that the government denies it.

19 The question the government asserts, as I understand their
20 position, is: Look. In order to assert the Fifth Amendment,
21 there has to be a basis for it. And, and, and as to some, in
22 the -- in the defendant -- in the government's view, there would
23 be a basis. And we have supplied that information to the Court
24 in the secret document.

25 As to others, it is the government's view there is not a

1 basis. And the answer is: I don't know. I don't know. We
2 just have to see how that unfolds.

3 **MR. KEKER:** How can --

4 **MR. FRENTZEN:** Well --

5 **THE COURT:** But there has to be some showing, based upon the
6 investigation or the evidence, other than a defendant simply
7 saying: It's Tuesday, I'm taking the Fifth.

8 I, mean it's got to have some basis in, in the reality of
9 the case.

10 **MR. KEKER:** Your Honor, I feel like I'm in a different
11 planet.

12 **THE COURT:** Okay.

13 **MR. KEKER:** The six people that we're talking about have
14 been identified by the government as co-conspirators in this
15 case.

16 And the idea that somebody is up here talking about: Oh, we
17 don't have to take -- I mean, the six people we are talking
18 about have been identified as co-conspirators. What more do you
19 want?

20 I don't know what's in that document. But I -- I am very
21 suspicious that it overstates the case. The government made the
22 decision not to prosecute one of those people two years ago, in
23 2015.

24 **MR. FRENTZEN:** Not accurate, not true.

25 **MR. KEKER:** Okay, I would love to see that and I'll look at

1 it in camera.

2 **THE COURT:** I don't -- you can see it if they want to give
3 it to you, but I'm not giving it to you. It's -- it's -- I
4 mean, that would be -- that wouldn't be appropriate for the
5 Court to do.

6 **MR. FRENTZEN:** And to be clear, Your Honor, that was -- I
7 mean, I know that -- I know there's citation to notes that don't
8 say what they contend they say. There's a citation to a
9 document created by the SEC that is temporal.

10 In other words, at that time, which of course is not a
11 mystery, because at that time, no indictment was brought. That
12 does not, as the Court knows, mean ever. And that's not what
13 the document says.

14 And the notes simply refer to two individuals being charged.
15 It says nothing about anyone else. And I think as the Court
16 knows, one of those was and one of those was not at that
17 particular time.

18 So those notes are worth what they're worth. But they don't
19 say -- none of them say that a decision has been reached not to
20 do X for an extended period of time.

21 So that's simply inaccurate.

22 **MR. KEKER:** If --

23 **THE COURT:** Well, I think all I'm saying is the showing that
24 the government made, which of course you weren't privy to, is
25 adequate and sufficient to justify the government's decision not

1 to immunize these witnesses at this time.

2 **MR. FRENTZEN:** Thank you, Your Honor.

3 **THE COURT:** That's all I'm saying.

4 **MR. KEKER:** And that we can accept. We get that. That's
5 the government's decision.

6 What we're saying to you is that you have the power and you
7 have the duty under *Straub* to look at not whether or not the --
8 the witness's Fifth Amendment invocation would be appropriate as
9 part of the defense witness immunity analysis, but instead, at
10 the *Straub* test.

11 And the *Straub* test that -- yes, we get it, that the
12 government doesn't want these people immunized. But we're
13 saying the prosecution has granted immunity to government
14 witnesses in order to obtain the witness's testimony, but denied
15 immunity -- they've said that -- to defense witnesses whose
16 testimony would have directly contradicted that of the
17 government's witnesses.

18 And in that sense, let me just go through Stouffer Egan.
19 Stouffer Egan is going to say nasty things about hardware. We
20 have direct contradiction of whatever he and others would say
21 about disclosure of hardware and the reason for hardware sales.
22 He is going to say things about the use of value-added resellers
23 and the recognition of the revenue at the end of the quarter
24 that would be directly contradicted by this, that, that list of
25 witnesses who were in a position to know. We can go through it

1 in detail.

2 But you have already heard -- I mean, we've got -- there's
3 60, 60 transactions that this expert wants to talk about. And
4 we can go transaction by transaction and witness by witness
5 within this, and we need this defense witness immunity, people
6 who were in the finance department and were there in England
7 knowing about what was going on, to directly contradict the
8 government witnesses.

9 **MR. FRENTZEN:** Well, the expert is not immunized, so that is
10 totally irrelevant.

11 And again, this has got to be the most bare-bones showing of
12 -- these are statements by lawyers saying: My client's going to
13 say he's completely innocent and that Autonomy did nothing
14 wrong.

15 That's it.

16 **MR. KEKER:** He can't --

17 **MR. FRENTZEN:** And so --

18 **THE COURT:** Okay, so the argument, if the argument is that
19 you have to make more of a showing.

20 **MR. FRENTZEN:** Well, that's part of my argument.

21 **THE COURT:**

22 **MR. KEKER:** Well, the argument --

23 (Simultaneous speakers)

24 **THE COURT:** You haven't made a sufficient showing. I think
25 the two arguments the government has advanced both are correct.

1 One, as to their written submission which I don't think you
2 are really arguing about, that's adequate.

3 I mean, I have looked at it, read it. It seems adequate.
4 And you're not contesting that because you haven't seen it. How
5 could you contest it if you haven't seen it?

6 **MR. KEKER:** (Inaudible)

7 **THE COURT:** As to the second point, which I also agree with
8 the government, is you have to make more of a showing. You have
9 to make more of a showing to show that this witness is key, it's
10 -- he is, he or she is going to say, da, da, da, da, da
11 which you will directly rebut.

12 I understand your point that -- and I take it as your
13 point -- that it could prolong the trial because you have to go
14 into particular transactions that that proposed witness has some
15 information about, and so forth. And I don't quite know what to
16 say. I hope it won't prolong it too much. But, you know, we're
17 not where you -- we're not where you want to be or --

18 **MR. KEKER:** (Inaudible)

19 **THE COURT:** You are not where I want you to be in order for
20 me to grant your motion, so I'm not granting your motion.

21 **MR. KEKER:** Okay, well, we --

22 **THE COURT:** It is without prejudice.

23 **MR. KEKER:** We will wait for the trial to start, listen to
24 the opening statement and then make a further showing.

25 I just --

1 **THE COURT:** You can make a further showing. You can make a
2 further showing.

3 **MR. KEKER:** Okay, we will and --

4 **THE COURT:** I'm denying without prejudice.

5 **MR. FRENTZEN:** (Inaudible)

6 **MR. KEKER:** And I just want to say --

7 **THE COURT:** Sure.

8 **MR. KEKER:** For these people in England, they have to get
9 visas and so on. So we will be coming back to make a showing,
10 but we don't want to delay anything. And we want to have them
11 available in the defense case.

12 **THE COURT:** Are we still issuing visas to the United
13 Kingdom?

14 **MR. KEKER:** Mr. Hussain goes through the agonies of --

15 **THE COURT:** Well, the government will cooperate in that
16 regard.

17 **MR. FRENTZEN:** We will, Your Honor. And my point is simply
18 that it -- if there are steps that need to be taken, then the
19 defense should take those steps now.

20 And may I have one moment, Your Honor --

21 **MR. KEKER:** And can we get --

22 **MR. FRENTZEN:** -- confer with counsel.

23 **THE COURT:** Yeah.

24 **MR. KEKER:** Can we get a commitment --

25 **THE COURT:** Wait, wait, he's having a conference.

1 (Off-the-Record discussion between counsel)

2 **THE COURT:** You need more time, counsel? Because I want to
3 take a recess. So I can -- if you would like further
4 discussions you can do that, and we can come back.

5 **MR. REEVES:** That would be nice.

6 **THE COURT:** Okay, we are in recess until 12:15. Thank you.

7 **MR. FRENTZEN:** Thank you, Your Honor. I apologize.

8 **THE COURT:** No, no, that's all right.

9 (Recess taken from 11:58 a.m. to 12:15 p.m.)

10 **THE COURT:** Okay, let the record reflect, all parties are
11 present, the defendants are present.

12 **MR. FRENTZEN:** Thank you, Your Honor. Sorry, after
13 consulting with my co-counsel, I have decided not to go there.

14 **THE COURT:** Not to say anything further.

15 **MR. KEKER:** Your Honor, we would like the government to say
16 on the record that they will do what they offered to do, which
17 is provide safe passage letters promptly to us, to be able to
18 give to these witnesses.

19 So that if we can persuade them to come --

20 **THE COURT:** I'm not going to require them to say it on the
21 record.

22 Here's the point. You ask the government. If the
23 government doesn't do it, come to me and I'll try to figure out
24 what the problem is.

25 **MR. FRENTZEN:** And to be clear, Your Honor, our offer is we

1 will offer safe passage if these witnesses are willing to come
2 and testify without immunity. That's what we have offered. So.

3 **MR. KEKER:** Well, can we -- okay. And can we get these
4 letters to at least show the witness, to consider?

5 **THE COURT:** Well, request it.

6 **MR. KEKER:** I'm requesting it.

7 **THE COURT:** No, no.

8 **MR. FRENTZEN:** We'll work with counsel but I just want to be
9 clear that that was our offer. And we'll work with counsel, and
10 hopefully the Court will not hear about this again.

11 **THE COURT:** Hopefully.

12 **MR. KEKER:** Well, don't count on it. I think you will hear
13 about it again. But thank you.

14 **THE COURT:** Who knows?

15 **MR. FRENTZEN:** Thank Your Honor.

16 **THE COURT:** All right. What's next?

17 **MR. DOOLEY:** Your Honor, I think there is one remaining
18 motion from the defense on Mr. Yelland, to exclude testimony of
19 Mr. Yelland before we get to items in IV on the pretrial order.

20 Your Honor, there are a couple of issues with respect to
21 Mr. Yelland. But the primary issue relates to his expert
22 opinion testimony regarding accounting issues.

23 The government wants to use Mr. Yelland, who was until
24 recently an HP employee, to offer expert opinion testimony, but
25 dress it up as lay testimony. They claim he's just going to

1 testify to what he saw, what he did, what he heard.

2 But just looking at the government's motion, or looking at
3 their opposition, it's clear that he is going to come in and
4 testify that Autonomy improperly -- these are the government's
5 words (As read) :

6 "...Improperly inflated revenue by approximately
7 \$156 million."

8 He's going to offer an opinion on the accounting of
9 Autonomy. And he shouldn't be allowed to do that. And there
10 are two reasons.

11 Number one, it's not lay opinion testimony under Rule 701.
12 As Your Honor surely knows, lay opinion can come in when it's --
13 you know, when it's an opinion formed through reasoning --

14 **THE COURT:** It's not lay opinion.

15 **MR. DOOLEY:** It's not lay opinion. I agree. And it's not
16 expert testimony that he can offer for two reasons, Your Honor.

17 Number one, recall that there are two separate accounting
18 systems or two separate set of accounting rules here. There's
19 international financial reporting standards, IFRS, and then UK
20 GAAP. And this is detailed, but it's important. Mr. Yelland is
21 not an expert with respect to IFRS. He's never worked at a
22 company that reported under IFRS. And the evidence will show
23 that he's admitted that he is not an expert.

24 So there is no way that he should be able to offer an
25 opinion that Autonomy's accounting was improper under IFRS.

1 That is a straight *Daubert* issue that I think the Court can
2 resolve now.

3 With respect to his opinion under UK GAAP, which we have
4 argued in connection with the restatement is irrelevant and
5 should be excluded for that reason -- but I don't want to
6 revisit that issue -- we believe that Mr. Yelland's testimony is
7 inadmissible because the -- the method that he used to reach
8 that conclusion that the accounting was improper under U.K. GAAP
9 is not reliable. And that's the method that went into the
10 restatement. The restatement was not signed off by the
11 accountants. Ernst & Young refused to sign off on the
12 restatement.

13 **THE COURT:** Isn't this a repeat of the argument about the
14 restatement? How is it different from that? We have already
15 had the argument about the restatement. Okay. And --

16 **MR. DOOLEY:** It is different.

17 **THE COURT:** I ruled. Now you say: By the way, they can't
18 call the witness who is going to talk about the restatement.

19 So it seems to me that that's a rehash of that argument.
20 Not the first part, but the second part.

21 **MR. DOOLEY:** It's obviously similar, Your Honor. We're
22 talking about the restatement and Mr. Yelland is the -- the HP
23 employee who prepared the restatement, and so it's obviously
24 similar. However, I think there are important differences.

25 There's the IFRS issue, which is that he cannot testify to

1 the accounting under IFRS because he is not an expert, that's
2 not what the restatement was about. So I think that is a
3 separate issue.

4 And then the other issue was whether the opinion that the
5 accounts at Autonomy were improper, whether that opinion comes
6 in under 702, and whether he can testify to that. And that's
7 our argument.

8 **THE COURT:** So respond to those two arguments.

9 **MR. REEVES:** Okay. Let me take the second one first.

10 If the government elicits from Mr. Yelland a view that the
11 accounting was, quote, improper, or fraudulent, yes. We accept
12 that it would be preferable for us to qualify him as an expert.
13 That takes us into a judgment more consistent with expert
14 testimony.

15 And I have appreciated the articulation of the argument by
16 counsel because as a lay opinion, I think it would be entirely
17 appropriate for Mr. Yelland to come in and testify to
18 adjustments that he made in the ASL financial statements as a
19 result of his reevaluation of certain --

20 **THE COURT:** But that is as a percipient witness, isn't it?

21 **MR. REEVES:** Correct.

22 **THE COURT:** I think it's a little late in the game to
23 qualify him as an expert opinion -- that he ought to give an
24 expert opinion, isn't it?

25 **MR. REEVES:** No.

1 **THE COURT:** Oh it's not, okay.

2 **MR. REEVES:** We have given them notice. They are not
3 objecting to the adequacy of our notice. I would argue that
4 he's entirely qualified as an expert. He has the qualifications
5 as a UK-chartered accountant that the defendant does.

6 **THE COURT:** So you are saying he can give it either as a
7 percipient witness or as an expert witness.

8 **MR. REEVES:** Depending on the choice that the government
9 makes about essentially the character of the testimony he would
10 give, whether he's just making adjustments to the financial
11 statements or going further and relying on his special skills to
12 identify those adjustments as improper or fraudulent, yes.

13 So that is a choice we can make in our judgment, but I
14 accept that the testimony needs to be hewed in that respect in
15 terms of --

16 **THE COURT:** You believe that you have complied with the
17 requirements for expert opinion.

18 **MR. REEVES:** Yes.

19 **THE COURT:** As to this witness on that subject.

20 **MR. REEVES:** We do.

21 **THE COURT:** Okay.

22 **MR. DOOLEY:** Your Honor.

23 **THE COURT:** What is your response?

24 **MR. DOOLEY:** We don't dispute that the government has
25 provided us with a disclosure of Mr. Yelland's testimony. And

1 our argument is -- I thought that the Court agreed with this --
2 is that we're in the realm of expert testimony here. This is
3 not lay witness testimony that the accountants don't comply with
4 IFRS or UK GAAP. That's not something a lay witness can offer
5 an opinion on.

6 The distinction that I understand counsel to be making is:
7 Well, he can come in as a percipient witness and testify as to
8 the fact of the restatement. But the fact -- but that is a
9 distinction without a difference. He is going to come in and
10 say: We adjusted these -- we took out all these transactions.
11 The obvious implication of that is that the transactions are
12 improper --

13 **THE COURT:** Okay, this is where you are losing me, actually,
14 you're losing me. I can't figure it out.

15 This witness prepared the restatement. Right?

16 **MR. REEVES:** Yes.

17 **THE COURT:** Okay, and you've objected to that, but that's --
18 that's been decided, the statement comes in.

19 Okay. So he goods up and he says: I did X, Y and Z. Okay.
20 Now, what does he testify? As a percipient witness, he --
21 change this, change that. So then the government says: Why'd
22 you do it? Why? Why did you do that? Why did you change X, Y
23 and Z?

24 And then he says -- and now he's giving an expert opinion.
25 He's now saying: I changed it because it's not in compliance --

1 my view is, my opinion is it's not in compliance with da, da,
2 da, da, da, da, da.

3 So he's doing both. He's doing both. And I don't see what
4 the problems is, as long as you have received notice as to,
5 number one, what is he going to say, that's important. Because
6 that has to be disclosed as an expert. And number two, what the
7 bases are for his reasoning, that has to be disclosed as well.
8 And the other things associated with an expert have to be
9 disclosed.

10 So you see why I'm not understanding what you are saying?
11 You may not like what they are doing. But haven't they done
12 that which is required in a pretrial setting with respect to
13 disclosures?

14 **MR. DOOLEY:** The argument isn't -- I agree with your -- the
15 argument is not a disclosure point, Your Honor. They have made
16 disclosures. Our argument is when you get to the second step
17 that you described.

18 **THE COURT:** Yeah.

19 **MR. DOOLEY:** Where he goes beyond saying: This is what we
20 did, and he says: This is why we did it because it's improper,
21 and it's clear from their disclosure that that is what they
22 intend to do with him, that is expert testimony. And our
23 argument is he is not qualified to say it was improper under
24 IFRS. There is no argument from the government on that point.
25 I haven't heard that he is an expert on IFRS. We're talking

1 about two separate accounting systems here.

2 If he's going to get up and say it's improper under IFRS --

3 **THE COURT:** Well, then --

4 **MR. DOOLEY:** -- he's not qualified to do that.

5 **THE COURT:** Well, stop. You're saying he didn't say that in
6 his disclosure.

7 **MR. DOOLEY:** I'm saying he did, he did say that in his
8 disclosures, but he's not qualified to say that. It is a
9 *Daubert* issue.

10 **THE COURT:** I see, okay. So it is not a question of
11 disclosure; it is a question of qualification. So the argument
12 is this person isn't qualified to give an opinion on the I --
13 whatever it is.

14 **MR. DOOLEY:** IFRS, Your Honor.

15 **THE COURT:** IFRS. Okay, what's your answer to that?

16 **MR. REEVES:** My answer is that he is a UK-chartered
17 accountant and the fact that he's 's not been in a business
18 situation where he is required to do disclosure under IFRS does
19 not make him disqualified as an expert with regard to IFRS.

20 And the defense, although he hasn't emphasized it today, has
21 suggested that somehow this is really a junk-science *Daubert*
22 issue. It is not. There's nothing about it that is junk
23 science. That there are divergences in the opinions of certain
24 experts with regard to the correct accounting treatment is just,
25 I think, consistent with a lot of expert testimony on a lot of

1 different subjects.

2 So, we disagree; that we think he is well qualified as an
3 expert on the topics that he would be testifying about. He is a
4 percipient --

5 **THE COURT:** Let me ask you this. You have an American
6 accountant, an accountant in America. And he's doing the books.
7 And he does something. You ask him: Why did you do this?

8 He said: Well, because GAAP requires it.

9 Could he testify as an accountant as to what GAAP is?

10 **MR. DOOLEY:** Your Honor --

11 **THE COURT:** Could he? Just, that's sort of like yes, or no,
12 or I don't know, or something.

13 **MR. DOOLEY:** If you had a U.S. trained accountant.

14 **THE COURT:** Yes, he is an accountant, certified to be a
15 Certified Public Accountant in the United States.

16 **MR. DOOLEY:** And he had experience applying U.S. GAAP, yes.
17 That person could be qualified as an expert. But this is a
18 person who has no experience. The government has the burden of
19 establishing the expertise of their expert. They have not met
20 that.

21 **THE COURT:** I think this, I think -- this is why I don't
22 like these motions. Why don't I wait and hear what he's going
23 to say is his experience and so forth, and I'll make some
24 determination. So, denied without prejudice.

25 **MR. DOOLEY:** Thank you. Your Honor, may I raise just two

1 other issues with respect to Mr. Yelland, just to get some
2 guidance from the Court and to flag the issue that I expect to
3 be coming?

4 **THE COURT:** Sure.

5 **MR. DOOLEY:** Which is based on the witness statements.

6 Mr. Yelland is another one who has been interviewed umpteen
7 times, we have a ton of 302s. And I expect that Mr. Yelland in
8 addition to saying: "Here is what happened with the
9 restatement," is going to get up and try to narrate some of
10 these underlying transactions. "Here's what happened, so-and-so
11 did this, so-and-so did that, there is an email that says this."

12 And our view is that is completely inappropriate for an
13 expert to do.

14 **THE COURT:** Really? I have to tell you, of all the people
15 that I basically allow narration from, it's experts. I mean,
16 really. They have a story to tell. They're paid to tell the
17 story. And the fastest way to get it out is just tell your
18 story.

19 And, I mean, I want to give a lot of leeway to narrative
20 statements. Leading questions. I don't want to be here for two
21 years. And this "What happened next, what happened next" will
22 drive everybody crazy.

23 So, it's -- if he can give a narrative -- I mean, you are
24 sitting here, you know exactly what he is going to say. At
25 least in that sense you know what he said on eleven other

1 occasions so maybe you don't know exactly what he's going to
2 say, but you have a pretty good idea. Let him say it. Cross
3 him on it. And that will be useful.

4 **MR. DOOLEY:** I hear you, Your Honor. Your Honor, this is a
5 case where --

6 **THE COURT:** So you want guidance? You got it.

7 **MR. DOOLEY:** I got guidance.

8 **THE COURT:** Got a lot of guidance, got a lot of guidance.

9 **MR. DOOLEY:** I respectfully disagree with that, Your Honor,
10 but --

11 **THE COURT:** Well, that's okay.

12 **MR. DOOLEY:** I made the point.

13 **THE COURT:** I don't take it too personally.

14 Okay.

15 **MR. DOOLEY:** I think that's it, Your Honor, for motions.
16 There are a couple of issues out of the pretrial conference
17 statement that we wanted to flag for the Court.

18 **THE COURT:** Okay. Are there any more motions that I have to
19 deal with?

20 **MR. REEVES:** No.

21 **THE COURT:** Ms. Little, you have been silent during this,
22 during this -- rising to address the pretrial issues? What are
23 you -- or are you just going to shove him aside and --

24 **MR. DOOLEY:** I got us in trouble with the last one,
25 Your Honor, so --

1 **MS. LITTLE:** I think I'm the master of ceremonies for this
2 portion, but I'm going to yield my time on the first three to
3 Mr. Dooley.

4 **THE COURT:** Okay, so where are we? Anything else?

5 **MR. DOOLEY:** We're on IV on the agenda here, Your Honor
6 (Indicating), just talking about some issues in the pretrial
7 that were raised in the pretrial conference statement that I
8 need to flag for you.

9 **THE COURT:** All right, let me see -- okay. Hold on.

10 All right. First is a court review of HP witness summaries
11 produced in camera.

12 Question: Have I gotten them? I haven't looked at
13 anything. Have I gotten them?

14 **MR. DOOLEY:** Well, that is actually a question that we have,
15 Your Honor, which is confirmation -- Your Honor has ordered HP,
16 pursuant to two subpoenas, to lodge summaries.

17 **THE COURT:** Do I have them? Does anybody know whether I
18 have them?

19 **MR. DOOLEY:** They are HP --

20 **THE COURT:** Somebody's here.

21 **MS. RESLEY:** Yes.

22 **THE COURT:** Come on up. I promise you won't be indicted.
23 Come on up. The government has offered you safe passage.

24 **MS. RESLEY:** Thank you, thank you.

25 **THE COURT:** All right, okay.

1 **MS. RESLEY:** Good morning. Susan Resley of Morgan Lewis on
2 behalf of -- R-E-S-L-E-Y.

3 Your Honor, we have lodged all of the summaries. There is a
4 set of summaries that, as we speak, is being couriered, that is
5 pursuant to those --

6 **THE COURT:** Will you bring them to the attention of
7 Ms. Scott, so she knows, and I'll take a look at them. Okay?

8 **MS. RESLEY:** Okay.

9 **THE COURT:** But really what I need to do, and I guess this
10 sort of morphs into what Ms. Little is going to talk about in
11 terms of order of witnesses -- I don't know if you are going to
12 talk about it or not. I have got to make sure that I don't
13 have, you know, a thousand pages to read before a witness
14 testifies or is in the process of testifying.

15 So I need some helpful guidance from the parties, as: This
16 person's going to testify, on such and such a date. This is,
17 this is the length of the testimony, and so forth. So I can
18 prepare myself to deal with it.

19 So let's all understand that's what's got to be done.

20 **MR. DOOLEY:** Your Honor --

21 **THE COURT:** Actually, for -- all you have to do is lodge
22 them, you don't have do anything else.

23 **MS. RESLEY:** Yes.

24 **THE COURT:** Okay.

25 **MR. DOOLEY:** And Your Honor, in that regard, it would also

1 be helpful for us to get a list perhaps from HP of the summaries
2 that have been lodged with the Court. I don't know that we have
3 a list of the summaries that have been lodged. That would
4 expedite the process you are describing.

5 **THE COURT:** Well, I'm not quite sure that's true, but is
6 there any objection to providing a list?

7 **MS. RESLEY:** Your Honor, there are some witnesses -- as you
8 know, there is a -- a proceeding that is in the UK, and there
9 are some just identifying some of the witnesses who may have
10 been interviewed by UK counsel, could itself be attorney work
11 product.

12 **THE COURT:** Well, I don't think there's an obligation for
13 them to do so. I think there is an obligation if Witness X
14 testifies, or is on the witness list to testify, then I think it
15 would be useful to, for the government -- you're not going to
16 know?

17 **MR. LEACH:** I don't have these, Your Honor.

18 **MS. RESLEY:** No. We have only provided --

19 **THE COURT:** Right.

20 **MS. RESLEY:** -- the information to the Court.

21 **THE CLERK:** (Nods head)

22 **MS. RESLEY:** There is one exception --

23 **THE COURT:** Are you going to be monitoring this situation?
24 I just wonder whether -- well, look.

25 **MS. RESLEY:** Yes, Your Honor.

1 **THE COURT:** Well, of course, the government will provide --
2 is going to provide defense, as to witnesses.

3 Would you please advise counsel if, in fact -- which
4 witnesses you are intending to call and so forth. And if there
5 is a statement, you can then advise the parties if there is a
6 statement. You can provide both the defense and prosecution a
7 statement.

8 **MR. LEACH:** Happy to do that, Your Honor.

9 **THE COURT:** Okay, great. Maybe that takes care of the
10 logistical issue.

11 **MR. DOOLEY:** I think it does. If we get a list of the
12 witnesses who are on the government's witness list for which --
13 for whom a summary has been provided, that would be helpful.

14 **THE COURT:** No. 2, identification of HP attorney witnesses
15 who authored the interview memoranda. That's not going to occur
16 at this time.

17 Now, if I find something which I believe to be inconsistent
18 and so forth, it may become an issue, and it may be necessary to
19 find out who the author of the memorandum is. But it's
20 premature at this time.

21 **MR. DOOLEY:** And Your Honor, I believe we have resolved it
22 with Ms. Resley, and we will be getting the identity of the
23 relevant witnesses.

24 **THE COURT:** Okay. Authenticity stipulations.

25 **MR. DOOLEY:** Your Honor, we have had ongoing discussions

1 both with counsel for the government, also counsel for HP and
2 counsel for Deloitte, about authenticity issues.

3 The only issue that I wanted to raise here is our request,
4 which is pending with the government, for a stipulation that
5 certain transcripts of interviews conducted of Deloitte
6 witnesses by UK investigators be stipulated as authentic. We
7 are not arguing that they come into evidence, unless there is an
8 inconsistent statement. All we are asking is for a stipulation
9 that these are true and accurate transcripts.

10 **MR. LEACH:** At this point, Your Honor, the government is
11 unwilling to enter into that stipulation. These are materials I
12 received from the SFO and the FRC. I don't know how they were
13 created, by whom. I also see absolutely no way that these are
14 coming into evidence without the SFO and the FRC investigator
15 coming to the United States to testify about what they are.

16 So at this point the government's unwilling to stipulate but
17 --

18 **THE COURT:** Yeah, but they are not asking what they are. I
19 mean they're not asking -- what they're asking for is: Would
20 you agree that this document is what it purports to be. That
21 is, it is a document prepared by Agent X or Place Y or Z and
22 that it isn't some --

23 **MR. DOOLEY:** We're asking --

24 **THE COURT:** -- some other things.

25 **MR. DOOLEY:** We're asking for a stipulation that it's a true

1 and accurate transcript of these interviews that were conducted
2 by government investigators who we have no access to --

3 **THE COURT:** Well.

4 **MR. DOOLEY:** -- for purposes of putting up -- (Inaudible)

5 **THE COURT:** But they may not be.

6 **MR. DOOLEY:** But it is within their power to figure it out,
7 Your Honor. It is not within our power to figure out from --

8 **THE COURT:** I don't know even if it's within their power to
9 figure it out. Some third party prepared something; it
10 purported to be a transcript of an interview. I don't know that
11 they can find out whether it's accurate or not. I mean, they
12 could ask somebody, but I don't know that it's, quote, in their
13 power.

14 **MR. LEACH:** The answer is: I don't know, Your Honor. It
15 hasn't really been an issue we have needed to pursue. I don't
16 have a proposed stipulation from the defense at this point.

17 **THE COURT:** Anyway.

18 **MR. LEACH:** I'm happy to look at it.

19 **THE COURT:** Okay.

20 **MR. LEACH:** I just don't see any way these are coming into
21 evidence, and don't really understand what the point of the
22 stipulation --

23 **THE COURT:** Well, the point of the stipulation would be to
24 save time.

25 **MR. LEACH:** And we are all for that, Your Honor.

1 **THE COURT:** And I guess, um, I can't force the government to
2 stipulate. Especially in something that's not within their
3 control or knowledge. However, if this -- if all things are --
4 come to fruition, that is, actually it is admissible or some
5 portion is admissible or so forth, then I'll deal with it at the
6 time. I'll just have to deal with it at the time.

7 **MR. DOOLEY:** Your Honor, I appreciate that ruling,
8 Your Honor. Just to underscore the issue, these are documents
9 that the government obtained from investigative authorities in
10 England demand --

11 **THE COURT:** But they didn't create them.

12 **MR. DOOLEY:** That's true, but they've had the benefit of
13 them for their investigation for years --

14 **THE COURT:** But that doesn't make them admissible.

15 **MR. DOOLEY:** I understand --

16 **THE COURT:** And it doesn't make them authentic.

17 **MR. DOOLEY:** I understand.

18 **THE COURT:** It doesn't do any of the things you need to
19 first -- that they have them, they get all sorts of things.
20 Most of what you get isn't so valuable.

21 But who knows? They may be very valuable. Can't do it in
22 the abstract.

23 **MR. DOOLEY:** All right. Nothing else on that, Your Honor.

24 **THE COURT:** Okay.

25 **MS. LITTLE:** The last housekeeping issues I think were

1 pretty much resolved. The issue about emails and possibly
2 having emails come in as business records, we just wanted to
3 flag that issue for the Court.

4 There's nothing to decide now, but we wanted to just alert
5 the Court to the issue and alert the Court to the *Deepwater*
6 *Horizon* case, which I think has a good test for evaluating
7 emails coming in as business records. So there is nothing to
8 decide now. We just wanted to alert you to the issue.

9 **THE COURT:** Well, what I'm concerned about when you start to
10 highlight things for me, is if you didn't think it wouldn't be
11 an issue you probably wouldn't highlight it. So, and that means
12 it probably will be an issue.

13 And now my question is, I look at these things in terms of
14 the flow of the trial. And, I like to be sure that if there is
15 an objection to an exhibit, that the objection is essentially
16 well-founded. That is, isn't based on -- on what I call the
17 authenticity dilemma. You know, is it what it purports to be?

18 And then, is there a basis for it coming in in terms of its
19 admissibility, which the government argues it is all business
20 records. I actually operate on the proposition that any
21 document referred to -- unless I hear an objection can come in,
22 I mean, obviously. I don't want to slow down, I don't want to,
23 you know, is this a true and accurate representation of da, da,
24 da, da. I mean, it just takes forever to do it.

25 So maybe, if there are exhibits that the parties believe may

1 create some issues as to whether or not they're admissible, I
2 would like to highlight that and try to resolve that outside the
3 presence of the jury, you know, at different times, as the case
4 progresses.

5 **MS. LITTLE:** (Nods head) And we can try to bring to the
6 Court's attention in the morning, if there are documents as to
7 which we believe there will be issues, we can certainly do that.

8 **THE COURT:** Sort of a good idea to bring it 24 hours before.
9 So I can rule on it, if that -- that day, so then the next day
10 it's smooth. Smooth as anything can be.

11 **MR. LEACH:** The concern from the government, Your Honor, is
12 people write emails for lots of different reasons. And if we
13 have a sponsoring witness up there who can testify about what it
14 means, why it was sent, what the context is, that's one thing.

15 But if the defense is trying to put in emails between two
16 people who are not here on the stand, where we cannot
17 cross-examine them, where we don't know what the words mean,
18 where we don't have the ability to test the foundation for the
19 business records exception, we are go-slow on agreeing to the
20 admissibility of that. And I think that's the issue. It is
21 very hard to decide in the abstract --

22 **THE COURT:** You start with the proposition that, in terms of
23 authenticity, in terms of the business record, the witness who
24 created the document, the email, it satisfies that prong. That
25 person can testify.

1 **MS. LITTLE:** Presumably, yes, right. Where the issue is
2 going to come up is so the government, because they have
3 designated 13 co-conspirators, they have pretty much full
4 license to admit emails at will under the co-conspirator
5 exception. From the defense side, we're not able to do that.
6 Ironically, in a civil case, if HP were the opposing party we
7 could bring them in as party admissions. Because HP -- this is
8 a criminal case, we don't have that option. So we have to rely
9 on other exceptions to the hearsay rule to admit emails. And
10 the most likely one would be either state of mind or business
11 records.

12 So, we just simply wanted to alert the Court that there are
13 other hearsay exceptions that we are going to have to be relying
14 on, emails coming in as business records can be tricky, and
15 there's law on it that we have cited to the Court. And we just
16 wanted to flag that.

17 **THE COURT:** I had better review that law. Because if it's
18 going to be tricky, I'd better understand what the trick is.
19 Okay. I mean obviously, state of mind, those are easy
20 determinations.

21 **MS. LITTLE:** Right.

22 **THE COURT:** Okay.

23 **MS. LITTLE:** Okay. Good-faith witness list. We have been
24 conferring with the government. The government provided a new
25 witness list a couple of weeks ago, with 69 substantive

1 witnesses or -- excuse me, 64 -- no, 69 witnesses, of which 53
2 they say are more likely than not to be called.

3 We would simply ask that that good-faith witness list be
4 updated as it can be. I think there may be some people on there
5 that the government may know that they're not going to call;
6 there may be additional people that they are adding.

7 **MR. REEVES:** I have agreed to do that.

8 **MS. LITTLE:** With respect to order of witnesses. We have
9 agreed to a three-day notice period, three-trial-day notice of
10 witnesses and their accompanying exhibits, which is terrific.
11 Mr. Reeves has also given us, as to about a dozen key witnesses,
12 whether they're likely to be at the beginning, middle or end.

13 For the remaining 40 witnesses, we would again ask the
14 government to give us -- we won't hold them to it, but a
15 good-faith kind of order of witnesses so that we're not
16 preparing for 53 witnesses on the first day of trial. It's a
17 long trial. And to the extent the government has even the
18 vaguest idea of this is kind of how it's going to go, it would
19 be extremely helpful to us to understand what we should be
20 preparing for, for the first week or two of trial.

21 **MR. REEVES:** I've agreed to confer with them about that.
22 And when they asked the first time, we answered their questions.
23 We're happy to keep talking.

24 **MS. LITTLE:** The next issue has a to do with exclusion --
25 sequestration of witnesses. We have agreed with the government,

1 we both agree that witnesses should be excluded. We also just
2 talked at the break, and we agree that once a witness is on
3 cross-examination, they will be sequestered from the sponsoring
4 attorney.

5 In other words, once Mr. Egan starts cross-examination, he
6 can't confer with the prosecutors about how it's going.

7 The last point on sequestration is that to the extent that
8 there are --

9 **THE COURT:** You agreed to that?

10 **MS. LITTLE:** I think he agreed.

11 **MR. REEVES:** I agreed --

12 **THE COURT:** I just never heard the government agree to that.
13 So I -- I -- I mean --

14 (Off-the-Record discussion between counsel)

15 **THE COURT:** Look, if they have agreed to it, they have
16 agreed to it, and that's the end of the matter.

17 **MR. REEVES:** I have --

18 **THE COURT:** I'm not -- but, I just want to make sure you
19 have agreed to it. Have you agreed to that?

20 **MR. REEVES:** Once my witness hits the stand, unless there's
21 an issue that is specific -- which I will alert counsel to, I'm
22 happy to -- I will not talk to that witness again until they are
23 done.

24 **THE COURT:** That is an exception that you could drive a Mack
25 truck through. I mean, the reason -- the reason that you talk

1 to the witness is because you have got to get a clarification --
2 you know, the witness gives his direct. Now he's on cross. He
3 says X. Catching one of the parties by surprise.

4 Okay. Is the government saying -- and that could be
5 nothing, it could be medium, it could be large, it could be
6 extra large. I don't know.

7 Now, is the government saying, because I think we have to --
8 this is exactly one of the rules that the lawyers start to shout
9 at each other during the course of the trial about, "You told us
10 this, and now it's Y."

11 I want to make sure there's absolutely a clear rule as to
12 whether or not either side can talk to their witness who is
13 undergoing cross-examination. So either you can or you can't.
14 And I need to know that.

15 **MR. REEVES:** I will follow the Court's direction --

16 **THE COURT:** No, I'm not directing in any way.

17 **MR. REEVES:** Okay.

18 **THE COURT:** I'm out of this. I -- I am -- it's a question
19 of whether you have an agreement to do so. If you have an
20 agreement to do so, then I will enforce that agreement.

21 **MR. REEVES:** The practice --

22 **THE COURT:** If you do not -- Listen to me, Mr. Reeves.

23 **MR. REEVES:** Okay.

24 **THE COURT:** Because I don't want to -- if you don't have an
25 agreement, I'm not going to order that to be done. Because I

1 never have, in any case. I -- much to the dismay of the
2 defense. I got that. So, what, did you agree or did you not
3 agree?

4 **MR. REEVES:** I think we did agree. I have agreed to do the
5 following. Once the witness hits the stand, I will not be
6 talking to them directly, the government will not speak with
7 them directly. If --

8 **THE COURT:** What does "directly" mean? Is that you send out
9 your agent, you say, "Hey..."

10 **MR. REEVES:** Directly or indirectly. I'm trying to
11 establish a bright line.

12 **THE COURT:** No, no, no, no. Maybe you ought to just answer
13 yes or no. "We agree to not talk to the witness." "We," that
14 means everybody. "We agree not to talk to that witness." Or
15 "We don't agree that we won't talk to the witness."

16 Obviously, if you talk to the witness, that's a fact I
17 may -- I may impose an obligation on a party to disclose that to
18 the -- to the opposite side before cross-examination is
19 concluded, or during the course of cross-examination. I may
20 order disclosure.

21 And then, of course, you could ask any questions you want
22 to. Because I don't like, quote, "secrets" going on. But this
23 isn't a secret. This is just a question of: What, what are you
24 going to do? What are you going to do, Mr. Reeves? Which way
25 are you going on this issue?

1 **MR. REEVES:** I agree not to talk to the witness once they
2 hit the stand, Your Honor.

3 **THE COURT:** Okay. There we are.

4 **MS. LITTLE:** Thank you.

5 The only remaining point on sequestration is on the
6 indirect-direct point, is that witnesses should also not be
7 provided transcripts or otherwise be told, you know, what's
8 happening in the courtroom. What the other testimony is.

9 **THE COURT:** I'm trying to get this, exactly what these --

10 **MS. LITTLE:** Well, witnesses are excluded. They also can't
11 be provided transcripts, for example.

12 **THE COURT:** Of the -- of the --

13 **MS. LITTLE:** Of other witnesses' testimony.

14 **THE COURT:** Yeah. I think that's right. They certainly can
15 be given their 302s or something else or another declaration or
16 anything else they said in order to prepare. I don't want to
17 curtail the preparation of a witness. After all, we're talking
18 about a two-month trial. So, yeah. I don't want to hear a lot
19 of "I can't recall."

20 **MS. LITTLE:** Right.

21 **THE COURT:** Okay.

22 **MS. LITTLE:** The Court has asked that the parties be
23 prepared to discuss the "formats in which exhibits such as
24 voluminous financial data should be admitted."

25 **THE COURT:** Right, yeah.

1 MS. LITTLE: I'm not sure what the Court has --

2 THE COURT: Okay. I'm now talking about pieces of paper.

3 Or drives or electronic stuff or all the things I can't figure
4 out. And, and I'm trying to figure out, in my mind, what
5 procedural are we going to use to show the jury what the
6 evidence is in the case.

7 MS. LITTLE: On the --

8 THE COURT: And that's what I need to know.

9 In other words, are you going to put it on a hard drive or
10 whatever they call those things? Are you going to -- how are
11 you going to do it? How are they going to see the exhibits?
12 How are they going to be admitted? How are they going to use it
13 during the course of deliberations?

14 This isn't like we have six documents, you simply give them
15 to Ms. Scott, she'll mark them A through, you know, F, and
16 that's it. That's easy. Those days are behind us, I guess. At
17 least in this case.

18 MS. LITTLE: (Nods head) I can answer for the defense. If
19 you want to ask the government first --

20 THE COURT: Well, what I do want is the parties to have a
21 single system. And I don't even care -- you know, I never care
22 about it's Government's A and it's Defense 2. You know, I don't
23 care about the numbering system, I don't care about any of that
24 except one system, one way of doing it. No duplication of
25 documents and so forth.

1 And so that they can be pulled up quickly, I like the
2 technical people on both sides to agree to help each other out.
3 Use the same system so we don't: Oh, now we're changing over to
4 system A and then system B. Very little works in this
5 courtroom, anyway, so you're going to have to deal with that.
6 Right?

7 **MR. REEVES:** We'll go first because it's our case?

8 **THE COURT:** Yeah.

9 **MR. REEVES:** Okay. I expect most of the witnesses -- most
10 of the exhibits will be paper documents, like the Court and
11 Counsel are familiar with.

12 Certain of them are special spreadsheets that are too
13 voluminous to be replicated on pieces of paper, and we would
14 settle on a fixed CD that is -- we would use in court,
15 electronically and would be made available to the jury in their
16 deliberations, electronically, in a secured or appropriate
17 computer for the jury deliberation. I have seen that done in
18 other cases, and I think it could be done reasonably easily
19 here.

20 **THE COURT:** Could I do this? Because this is all going to
21 go over my head shortly, can I just have the parties meet and
22 confer?

23 **MR. REEVES:** Yes.

24 **THE COURT:** And agree upon a system.

25 **MS. LITTLE:** Yes.

1 **MR. LEACH:** Yes.

2 **THE COURT:** I mean, you understand what has to be done.

3 **MS. LITTLE:** Yep.

4 **MR. REEVES:** The only question I have in this vein is: What
5 does the Court want in advance of the testimony on a particular
6 day, in the form of witness binders and things of that nature?

7 **THE COURT:** Well, we're talking about in terms of documents?

8 **MR. REEVES:** Yes.

9 **THE COURT:** I haven't thought about it.

10 **MS. LITTLE:** We can meet and confer and figure that out too.
11 But I don't know.

12 **THE COURT:** I mean, it helps that I can follow through --

13 **MR. REEVES:** We'll give you a witness binder.

14 **THE COURT:** Yeah, I think that's right.

15 **MR. REEVES:** All right.

16 **MS. LITTLE:** I also should just ask, do we need an order
17 from the Court to get permission to bring electronic equipment
18 in?

19 **THE CLERK:** (Nods head)

20 **THE COURT:** Yes.

21 **MS. LITTLE:** So we should discuss with Ms. Scott how to do
22 that.

23 **THE COURT:** Right.

24 **MS. LITTLE:** All right, I think that is it.

25 **MR. REEVES:** I have one last question, Your Honor.

1 **THE COURT:** Sure.

2 **MR. REEVES:** The defense had asked that counsel -- not
3 witnesses, counsel be excluded from the trial. I do not think
4 that that's an appropriate application of the witness exclusion
5 rule. And I wanted to make certain there was no ambiguity about
6 that.

7 **THE COURT:** So you're talking about a witness's attorney.

8 **MR. REEVES:** Correct.

9 **THE COURT:** And can a witness's attorney be excluded -- if
10 you exclude witnesses, can you also exclude their counsel.

11 **MS. LITTLE:** Either that, or you can give an admonishment
12 that the counsel should not reveal the testimony --

13 **THE COURT:** Well, that is rather dangerous. I mean, then
14 I'm really wading into -- maybe I have to. I haven't figured it
15 out. But to -- it is a difficult -- if I had a rule which said
16 a lawyer can't tell his client something, I have to figure that
17 out. I mean, we do it all the time in protective orders, but I
18 haven't quite figured out whether you do that in terms of
19 witnesses and during court proceedings.

20 And I guess what you are saying is it would defeat the
21 purpose of the exclusion if in fact, they're sitting here with
22 their lawyers, writing all this down, and then if a witness has
23 been excluded they go back and they say: Well, look, here are
24 the five issues that you ought to be aware of, and this is what
25 Jones says and this is what Smith says, and so forth, you have

1 actually circumvented the rule.

2 So your position is that if an attorney comes in who
3 represents a prospective witness, they should be instructed not
4 to disclose what occurs in testimony prior to their client's
5 testifying. Their appearance. That's what you are saying.

6 **MS. LITTLE:** Correct.

7 **THE COURT:** Has that been done? I don't know.

8 **MR. REEVES:** No, I don't think it's ever been done. And I
9 think the Court has a --

10 **THE COURT:** Why shouldn't it be done, I guess is the
11 question.

12 **MR. REEVES:** I think -- um, why shouldn't it be done? I
13 think there are very good reasons not to do it. First of all,
14 this is a public proceeding. Second of all, there could be lots
15 of interest associated with a witness's counsel that are
16 relevant in the -- by allowing the lawyer to witness relevant
17 pieces --

18 **THE COURT:** No, I don't think I can exclude the lawyer. I
19 mean, the question is can I -- can I order the lawyer -- and I
20 guess everybody knows who the lawyers are for these parties and
21 so forth. But can I direct the lawyer not to discuss the
22 testimony that was elicited during the course of the proceeding?
23 That is the -- that is the question.

24 **MR. REEVES:** I think the Court is right to be cautious with
25 regard to such direction. I think the remedy's already there,

1 which is cross-examination. And I think the lawyer --

2 **THE COURT:** How does that go? Does it go like: Now,
3 Ms. Jones, you see that -- that lawyer out there -- Ms. Smith?
4 Is that your lawyer?

5 Yeah.

6 And Ms. Smith's been here every day.

7 Yeah.

8 Well, let me ask you, did you have a conversation with your
9 lawyer, Ms. Smith?

10 Yes.

11 Well, what did you say?

12 I think it's privileged. I have sense it might be
13 privileged.

14 **MR. REEVES:** I'm sure those wouldn't be the questions that
15 these counsel would ask.

16 **THE COURT:** No, they are my questions.

17 **MR. REEVES:** Those might be privileged questions.

18 **MR. KEKER:** (Inaudible)

19 **MR. REEVES:** But the question: Isn't it a fact that you
20 know what Mr. Jones, Ms. Smith said yesterday? Isn't it a fact
21 you've just adjusted your testimony?

22 You don't have to get into the how but there is a remedy,
23 with the witness. And I think there's a long custom and
24 practice --

25 **THE COURT:** It's okay until she says no. So then you say:

1 Okay, now I'm going call the lawyer who is here writing it all
2 down, because it's clear that this testimony has changed as a
3 result of a conversation.

4 I don't know. I don't know that there's another remedy. I
5 need to think about it. If you people want to -- want me to
6 issue an order, propose one. I don't need to do the work.

7 **MR. REEVES:** Okay.

8 **THE COURT:** Even though my billable rate is actually more
9 reasonable than some other attorneys' billable rates -- I'm not
10 singling out anybody here, just saying that it is a reasonable
11 rate. Reasonable advice at a reasonable rate.

12 **MS. LITTLE:** Fair enough.

13 **THE COURT:** Okay. You will write something if you want me
14 to do it.

15 **MS. LITTLE:** Will do.

16 **MR. REEVES:** I think that's all for the government,
17 Your Honor.

18 **THE COURT:** Is that it? Only three hours?

19 **MS. LITTLE:** Two days scheduled -- so we are doing pretty
20 well.

21 **THE COURT:** We are doing extremely well. Now, my question
22 is: How long is your opening going to be? Roughly.

23 **MR. REEVES:** One hour.

24 **THE COURT:** One hour.

25 And the defense will not be making an opening? You will

1 simply reserve --

2 **MR. KEKER:** Your Honor, if I do, I would estimate an hour,
3 too.

4 **THE COURT:** Okay. So, get ready with witnesses. We'll move
5 quickly. And you know my rule. You all know my rule?

6 **MR. KEKER:** (Shakes head)

7 **THE COURT:** When you ran out of witnesses, you rest.

8 **MR. REEVES:** (Nods head)

9 **MR. LEACH:** (Nods head)

10 **MR. REEVES:** We know your rule.

11 **THE COURT:** Unless you have a very good reason for running
12 out of witnesses. So, you know, you have got to be prepared by
13 things like: No, we don't have any questions. That sort of
14 cross. That happens every now and then. Especially if the
15 witness isn't going to help them. Yeah. No, we don't have
16 anything.

17 **MR. REEVES:** We know the rule, Your Honor.

18 **THE COURT:** We don't have any questions for that. Right?
19 So, be prepared. Have them lined up.

20 I know it's an inconvenience. I understand that. But it's
21 nothing, it doesn't equal the inconvenience for everybody else.
22 And of course, I'm thinking about myself. Okay?

23 **MR. REEVES:** Understood, Your Honor.

24 **THE COURT:** All right. Okay. All right. Thank you. We
25 are in recess.

1 **MR. REEVES:** Thank you.

2 **MR. FRENTZEN:** Thank Your Honor.

3 **MR. KEKER:** Thank Your Honor. Have a good vacation.

4 **THE COURT:** Yeah.

5 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Thursday, February 15, 2018